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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATES' COURTS

OF THE

STATE OF NEW YORK.

BY

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NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
July, 1879.

CROWE v. BRADY.

*In the matter of the accounting of THOMAS B. BRADY,
as administrator, &c., of CATHERINE BRADY,
deceased.*

The death of one who has deposited moneys in his name, as trustee for another, does not constitute the trust funds assets of decedent's estate; at most, it would devolve the trust upon decedent's representative, and the surrogate's court has no authority to call him to account as trustee, for the administration of that trust.

An entry by an administrator in his account book, under the head of an inventory of the effects of the estate, of money deposited in bank by the intestate, and withdrawn by him, under authority of his letters, does not prevent him from claiming the money as his own; nor is he concluded by a declaration of the intestate, made in her lifetime, in his absence, inconsistent with his title.

In proceedings against an administrator, to compel him to account, his testimony concerning transactions and conversations with the intestate, called out by the moving party, cannot be stricken out or disregarded upon the latter's motion, though otherwise if it had been offered by the administrator, and objected to at the time.

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The intestate, at the time of her death, possessed, besides other property, certain moneys deposited in savings banks in her own name, individually, and in trust for her several children. Upon an application by one of the children to compel her father, the administrator, to account for these moneys, the evidence showed that they were derived exclusively from his earnings, and that he had delivered them to the intestate, as his agent, to deposit the same in trust; that he had withdrawn the moneys from bank through the instrumentality of his letters, making an entry, in an account book, of the receipt thereof, as of a portion of the effects of the intestate, and had re-deposited a portion in his own name, as trustee for certain of the children, but subsequently withdrew the amounts and claimed to have expended the moneys for the support and maintenance of the children. *Held*, that the husband, by the mere delivery of these moneys to his wife, did not divest himself of his title thereto, and that he was not estopped from claiming title by the entry in his account book, nor by procuring the moneys through the instrumentality of his letters.

Held, also, that upon the petitioner's own theory, the moneys claimed by the children did not constitute assets of the intestate's estate, for which the administrator, as such, could be called to account in the surrogate's court, but that their remedy was an action against the husband, for conversion.

1 *R. S.*, 730, § 68, and the conflict between *Bunn v. Vaughan* (3 *Keyes*, 345); *Kane v. Gott* (24 *Wend.*, 641); *Savage v. Burnham* (17 *N. Y.*, 561), and *Curtis v. Smith* (60 *Barb.*, 9), as to the application of that section to personal estate, commented upon.

APPLICATION by one of the children of decedent and the administrator, to compel the latter to account as such administrator.

The petition of Catherine A. Crowe, one of the children of decedent and the administrator, alleged the death of decedent, December 12, 1867, seized and possessed of No. 204 Henry street in New York city, worth \$12,000, and personal property consisting in part of \$3,333, deposited in banks; that the administrator received letters February 5, 1868, and that he had failed to account; and prayed for an accounting.

In answer to the petition, the administrator denied

that any property of the decedent had come into his hands as administrator, and alleged that the money referred to in the petition belonged to him; that decedent left six children, and that he had expended said moneys, and others of his own in addition, for their support.

The matter thus put in issue was referred to A. S. Sullivan, Esq., the order of reference, though absolute, being regarded as a reference by authority of *L.* 1870, ch. 359, § 6, and as subject to the confirmation of this court.

The referee returned the testimony taken by him and filed his report.

The following is a portion of the testimony, deemed material to be inserted here :

Thomas B. Brady, the administrator, being called by petitioner and sworn, testified that no property came into his hands as administrator; that the property did not belong to decedent, but was intrusted to her as his agent to deposit in the banks, and that she made the deposits under his instructions for the benefit of the children; that he presented an order from the Surrogate, and drew out the money from the banks; that he gave instructions to deposit the money in the names of his children, for the purpose of drawing full interest; that when he drew it, it was transferred to his name in trust for his children, so that he could draw it out, and use it for their wants; that he instructed decedent to deposit the money in her name, and in the children's names, so that it would draw the most interest, as sums under \$500 drew one per cent. more than larger sums; that he drew out part of the moneys

for the necessities of his children, but that he had no idea how much, as the accounts had been stolen, and after stating the names and ages of his children, he testified that his best recollection was that, when he balanced his accounts in 1872, he had expended \$5,400 for his children; that his books and vouchers of such outlay were stolen; that he was married to decedent in 1851, and was engaged with Lyelle, Polhemus & Co. from 1847 to 1871, and made large earnings, saving several hundred dollars every year, which his wife invested for him, as he had no time to attend to it; that when he saved money he took it home and delivered it to decedent to deposit to the best advantage in the savings banks; that from 1851 to 1865 he saved enough money to buy 204 Henry street, which was purchased with his earnings; that from 1865 he saved \$3,000 or more, and delivered it from time to time to his wife to deposit as aforesaid; that all the money deposited by his wife in her name, and that of the children, was earned and saved by him, and no part of it belonged to her, or the children; that when he married his wife he had no property, nor did she inherit any afterwards; that she superintended his household as his wife.

Mrs. Ann C. Fitzpatrick, being sworn for petitioner, testified that she knew decedent, and saw savings bank books in her possession; that decedent kept those books in a pocket sewed on her flannel skirt on her person; that the administrator called upon witness after the death of his wife, and inquired where the books were, and witness told him, in the flannel skirt, and where it was to be found; that decedent said

she was putting money in for the children's benefit, when she was going to the bank at one time.

This latter evidence was objected to as incompetent and as hearsay. The objection was overruled by the referee, and the evidence received.

On cross-examination, witness testified that this occurred several years before decedent's death; that she went with decedent to the bank on that occasion; that she did not refer to any particular bank.

Thomas B. Brady testified in his own behalf to his keeping books of account of the expenditures of his children, and stated their disappearance and his search for them, and that he had vouchers for his disbursements, which also disappeared, and could not be found; that the bank books of his wife were kept in a satchel in a trunk in her sleeping apartments, and after her death they were kept in the same place; and contradicted Mrs. Fitzpatrick as to their being in decedent's flannel skirt, and that he called upon her respecting the books; that when he handed the money to his wife to deposit he would tell her on what account to deposit, and if any of the accounts were full, he would instruct her to open new ones, and gave her the name, and that if she drew any interest she brought it home and delivered it to him; that the banks would not allow two accounts to be opened in one name; that the moneys in question were all the moneys which he had saved during the period mentioned; that he took out letters of administration for the purpose of getting the money from the bank, which was in decedent's name in the form of a trust for his

CROWE v. BRADY.

children ; that he kept books as administrator by the advice of his counsel, as a precaution against trouble.

On being shown page 30 of his book, stating the money received as administrator, he testified that the statement that it was the property of decedent was not true.

Counsel for the petitioner moved to strike out several portions of the testimony of the administrator, respecting conversations and transactions with decedent, as inadmissible under section 399 of the code, which motion was denied by the referee on the ground that the evidence was received without objection, and the motion to strike out was too late.

By his report, the referee found that the decedent died December 12, 1867, leaving six children and her husband, the administrator, surviving ; one of the children being about twenty-five years old, another about twenty-three years, another about twenty-two, one about eighteen, one fourteen, and one eleven.

That at her death decedent was possessed of certain moneys deposited in savings banks, in her name, individually, and for her children, amounting to \$3,251.64, as follows :

Bowery Savings Bank, in the following name :—
“Catherine Brady, in trust for Anna L. Brady, \$215.27 ;” “Catherine Brady, in trust for Ada A. Brady, \$107.62 ;” “Catherine Brady, in trust for Emilie A. Brady, \$535.55 ;” “Catherine Brady, in trust, \$535.55.” Bank of Savings :—“Catherine Brady, in trust for Ada A. Brady, \$530.12 ;” “Catherine Brady, \$530.12 ;” “Catherine Brady, in trust for Kate

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Brady, \$534.40;" "Catherine Brady, in trust for Ann L. Brady, 263.01."

That this money was the property of decedent, derived mainly from the gift of her husband, earned by him; that the decedent took and retained possession of the bank-books; that it appeared from the evidence that, in July, 1868, after the administrator's appointment, he caused the accounts in said banks to be closed, and new accounts opened of the same moneys in his name, and in trust for his children, as follows: July 28, in the Bowery Bank, in trust for Anna L. Brady, \$215.27, which he maintained and added to until October 1, 1871; in trust for Emily A., \$535.55, to which he added other deposits up to February, 1875; that, of the money deposited by decedent in trust for Kate Brady in said bank, \$300 was re-deposited by him as trustee for her, January 6, 1869, and with subsequent additions and interest amounted to \$577.85, July 1, 1871; which the referee cited as illustrations of the actions of the administrator; and found that as he acquired possession of the moneys as administrator, he was liable to account for them as such, and that the moneys deposited by the decedent in the names of her children belonged to them, who would be entitled to enforce their claim for them against the administrator, and that he was accountable for the sums deposited in the name of his wife the decedent individually, which were collected by him; that the administrator spent money upon the education and maintenance of the children after the death of the mother, but that it did not clearly appear, by the evidence, how long he did so, or in what amount, except that, by his own estimate,

which the referee regarded as liberal, the expenses of each child amounted to \$300 per annum ; that he had no right to charge that against the estate, because not appointed guardian of them, or required to account as such ; that the petitioner and her brother and sisters were entitled to the moneys deposited in trust for them by the decedent, and that the administrator, having taken possession of them, was accountable therefor, as well as for moneys deposited by decedent in her individual name ; and that as the administrator filed no inventory, the proceedings were rendered necessary by his refusal to account, and the costs should be chargeable to him personally.

To this report the administrator filed the following exceptions: That this court had no jurisdiction to try the title to the moneys mentioned ; that the order of reference did not confer upon the referee power to hear and determine ; that he erred in finding that the moneys were assets of this estate, as the administrator was not estopped from showing his title thereto by reason of his receipt of the same from the banks on presentation of his letters ; that if the moneys belonged to the decedent when the deposits were made, such deposits were in trust for the children, and vested the title in them, and therefore it did not become assets of this estate, and that the administrator could not be called to account for them in this proceeding ; and that if the moneys deposited in her name were hers, one-third thereof would belong to the administrator, as her husband ; that the property, if it belonged to the decedent, included the house in Henry street, yet as no guardian was appointed for the infant children, the

father, the administrator, became their guardian in *socage*, and entitled to use their moneys, being without means himself, for their necessary support and education, and as such guardian was entitled to be allowed such expenditure.

STEWART & TOWNLEY, *for petitioner.*

WAKEMAN & LATTING, *for administrator.*

THE SURROGATE.—The evidence in this case leaves the matter in no real doubt as to the source whence the money deposited by the decedent to her credit in trust for her children was derived, for it is entirely apparent that it all belonged to the husband of decedent, Thomas B. Brady, unless he divested himself of his title by delivering it to his wife as a gift; and I regard all the testimony taken in this proceeding upon the subject of the wife's earnings as well as the earnings of the petitioner, as having no bearing upon that question, so that the only evidence militating against that of the husband as to the ownership of the property, is the fact that it appears to have been deposited by the decedent, and that the administrator entered in his account book, under the head of an inventory of the effects of the estate, the several sums thus deposited by his wife and withdrawn by him under the authority of his letters of administration; for I differ entirely with the referee in this matter, in his estimate of the significance of the declaration of the decedent to a third person, that she was going to deposit money in trust for her children, since this inquiry is between the estate of the decedent and the husband, who claims to be the owner, and no declaration of hers in his absence could affect his title.

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I am of the opinion that the testimony should not have been received on such an inquiry, for no claim, or declaration of hers, in the absence of the alleged claimant, would tend to show her title, or divest that of any other person, while any declaration tending to show liability on the part of the decedent would be binding upon her and her representative, and it appears to me that those two ideas have been confounded.

The fact of the deposit by decedent, in her name, as trustee for her children, does not seem to me inconsistent with the facts testified to by the husband, or with the ownership of the money by him, and there appears, therefore, to be nothing to militate against the testimony of the husband, except his own conduct in treating the money as assets of the decedent's estate. The fact that he took out letters, and obtained the money under those letters, has no significance when explained, because, being thus deposited, it was the only method by which he could obtain possession of the money, unless he should resort to an action for it as the owner, and it is of very frequent occurrence that moneys deposited in the name of another, who is deceased, are obtained by the owner through the instrumentality of letters of administration. Therefore, nothing is left except the memoranda in his book, to which reference has already been made, to materially contradict or impair the force of the testimony given by the administrator, and it is quite clear that, if he had made a formal inventory, and filed it under the statute, making a clear case, he could explain that inventory and overcome its force as a charge against him, by showing that the property did not, in fact, belong to the estate.

It is true that all the testimony of the administrator which was given, of transactions and conversations with the decedent, would have been excluded under the Code if objected to and offered by him, but it was called out by petitioner, and as it was not objected to, but offered by the moving party, it stands as evidence in the case, and this court has no right to disregard it. If I understand the claim of the petitioner, it is substantially that this money principally and originally belonged to the father, and there is no evidence in the case tending to prove any gift by him to the decedent; on the contrary, all the evidence there is on this point is that of the decedent's husband—that he delivered it to her to be deposited as his agent, and as his property, and all the title that she had is evidenced by the fact of deposit in her name, individually or as trustee for the children: but suppose, as to the deposit in favor of the children, it be held that the decedent was trustee of the fund for the children respectively, the death of the trustee did not constitute that trust fund assets of her estate, and at most it would devolve the trust upon her representative, and it seems to me equally clear that in that aspect of the case I have no authority to call him to account as trustee for the administration of that trust, for this court has no jurisdiction over such trustee; and though by virtue of his representation of the deceased trustee, the trust may devolve upon him, yet it in no way constitutes him custodian of the trust estate, as assets belonging to the deceased trustee. If it had been alleged that the deceased trustee had misappropriated the trust fund, then undoubtedly the *cestui que trust* could look to the estate, through its

representative, for remuneration, but that is not this proceeding. If it had been presented as a claim against the estate, and disputed by the administrator, this court would have had no jurisdiction over the question, and the claimant would have been put to a reference under the statute, or an action against the representative. It follows that, in either aspect of the case, neither the administrator as such nor as trustee succeeding to the trust of the decedent, can be called to account in respect to funds deposited in trust by decedent for the children respectively, and that their remedy, if any, is by an action against the respondent, as having unlawfully appropriated their funds, not in his capacity as administrator; as it is conceded by the petitioner that the money did not belong to this estate, and any interference with it on the part of the respondent was an unlawful conversion of it, which can only be redressed by action.

It was suggested that the respondent could at most be held to account in respect to the funds deposited in trust for the children, as trustee succeeding by representation to the trust estate of the decedent. I do not undertake, because it is unnecessary for the disposition of this case, to pass upon the effect of section 81 of 2 *Revised Statutes* (6 ed.), p. 1110, and the conflict between *Bunn v. Vaughan* (3 *Keyes*, 345); *Kane v. Gott* (24 *Wend.*, 641); *Savage v. Burnham* (17 *N. Y.*, 561), and *Curtis v. Smith* (60 *Barb.*, 9), as to its application to personal estate; but in passing, it is proper to suggest that that section, under the head of uses and trusts, is embraced in title 2, entitled "Of the nature and qualities of estates in real property, and the alienation thereof," and the express trust referred to in that section is defined by

section 55 of the same title, page 1106, prescribing the purposes for which an express trust may be created, and all relating to land, or the rents and profits thereof ; but it seems to me that unnecessary confusion has arisen in considering that section ; for if it be held to only apply to real estate trusts, yet it is quite apparent that there is no law which would do more than vest the property in question in the representative of the deceased trustee, not as absolute owner, but simply holding the title as trustee, and answerable as such to the *cestui que trust*.

I am of the opinion that the learned referee has given altogether too much significance to the entry made by the respondent in form of an inventory of the estate of decedent in his account book, on page 30, for if he had regarded so much of the funds as were deposited by the decedent in trust for the children as such trust, he would not have been likely to enter it as assets of this estate, especially as it appears, in the same account book, and by other evidence, that he proceeded to deposit a portion of the same fund in like trust for some of the children ; and I am constrained to regard that memorandum as a mere statement of the amount he received from the banks through the instrumentality of his letters of administration, and not as a declaration that it belonged to the estate of the decedent.

Having reached this conclusion, it is unnecessary for me to pass upon the question whether, as between the estate in question and the *cestui que trust*, the trust was perfected and valid, or whether any credit should be awarded to the administrator for his support of the infant children of the decedent, though no guardian was appointed.

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given upon another branch of the case, and for the purpose of showing the expenses, &c., which attended the real estate proceeding, and not as evidence of the existence and validity of her claim ; and the counsel stated in substance that he did not understand, when the case was submitted to the auditor, that the executrix's demand was disputed, and that if it were, he assumed that it was to be proved and allowed before the Surrogate, personally.

CEPHAS BRAINERD, *for executrix.*

N. B. SANBORN, *for creditors.*

THE SURROGATE.—The moving papers contain strong *prima facie* evidence of the existence and validity of the claim, and it is quite apparent that injustice is likely to be done to the claimant, unless she shall be permitted to give evidence of the claim before the auditor.

On the part of the defense to the motion, it is alleged that the counsel for the executrix was distinctly informed, on the summing up and submission of the matter to the auditor, not only that the executrix's claim was disputed, but that it was insisted that there had been no sufficient proof to establish it before the auditor, and that if any proof were to be given, it should be immediately given before the auditor, and before submission, and that her counsel stated that he relied upon the proceedings for the sale of the real estate as sufficient proof, and should give no further evidence. Her counsel, however, rejoins by affidavit that he did not understand the suggestions of counsel as inviting him to give further proof ; if he had, he would have accepted it.

The order for sale of the real estate recites the proceedings, and that the debts, for the purpose of

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satisfying which the said application was made, were justly due and owing, and not secured by judgment or mortgage upon, or expressly charged on the real estate of the deceased, and that the same amounted to \$45,822.70 and upwards, and then proceeded to direct the sale.

It is not disputed that this latter amount embraced the executrix's claim established before the Surrogate.

The executrix, in her account, states the amount of her claim at \$9,469.01, and the amount paid \$5,707.17, and the auditor refuses to allow this payment, because the claim had not been proved according to law, for the reason that the order adjudging claims valid and subsisting against the deceased was subject to adjustment as to the extent and right to share in the proceeds of sale on final accounting, and that it only adjudged the claim valid for the purpose of authorizing the sale of the real estate, and that the executrix should not be credited with the payment to herself of \$5,707.17.

It is quite clear that the executrix had no authority to retain any of the assets of this estate in satisfaction of her debt or claim until it had been proved to, and allowed by, the Surrogate (3 *Rev. Stat.*, 96 [6 ed.], § 43), and therefore, on the final accounting, she should have been charged with interest on so much of the assets as she had applied to the payment of said claim down to the time when her claim was adjudged by the Surrogate in the real estate proceedings, and the claim should have been for the full amount of her demand proven, as she had without authority appropriated assets to its payment, and she should have been charged with that amount as assets in hand.

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By section 44 of the same statute, it is provided that proof of the debt or claim of an executor or administrator may be made on service and return of a citation for that purpose, or on the final accounting of any such executor or administrator pursuant to the 3d article of the 3d title, chap. 6, of the 2d part of the Revised Statutes, which article provides, among other things, for the settlement of such accounting, by the appointment of auditors. It is quite clear, therefore, that the claim in question might have been appropriately proved before the auditor in this matter.

I do not understand the auditor to hold that if the Surrogate had duly adjudged valid and subsisting against the estate of the deceased, the claim of the executrix, on the real estate proceedings, it was not a valid establishment of the debt against the estate for all purposes, for the same proof is necessary for its establishment in that proceeding, as is required to establish it under a proceeding specially instituted for the proof of an executor's or administrator's claim against the estate, or on final accounting ; and I can see no good reason for holding such an establishment less binding or conclusive upon the estate, than in the other proceedings named ; but if I understand correctly the auditor's report, he bases his opinion that the claim is not sufficiently proved by these proceedings, upon the qualifying language of the order of the Surrogate, " subject to adjustment as to the extent, amount and right to share in the proceeds of sale," etc.,—certainly an unusual and unfortunate expression, but not in my opinion qualifying the amount determined by that order ; and if it reserved any right

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to adjust the particular amount in case of error, the determination was effectual until such error should be established.

I entertain no doubt of the sufficiency of the proof before the auditor to establish the claim of the executrix to the amount adjudged by this court on the real estate proceedings, but it is quite apparent that the basis of the establishment of the debt was erroneous, and under the circumstances of the case, I think the executrix should have the opportunity to establish her claim before the auditor upon such terms as will not unreasonably delay the proceedings, or increase the expenses to the estate.

Let an order be entered, sending the matter back to the auditor to take further proof as to the validity and extent of the executrix's claim against this estate, and that the hearing before the auditor be proceeded with upon two days' notice, and proceed from day to day until the proof shall be in, with leave on the part of the contestants to disprove the claim as they shall be advised; the further hearing to be at the expense of the executrix as to auditor's and stenographer's fees, and that they pay to the two counsel opposing this motion the sum of \$10 each, on service of a copy of the order to be entered herein.

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NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
November, 1879.

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*In the matter of the probate of the will of WILLIAM R.
COLLINS, deceased.*

It is not necessary that the declaration of a testator, that the instrument signed by him is his will, should be made in the very act of signing. It is sufficient if the acts be done on one occasion, and form parts of the same transaction.

Acts constituting sufficient publication considered.

The intervention of a blank page between disposing parts of a will, though a careless method, does not necessarily invalidate the instrument, especially where the blank divides a continuous sentence. Nor does the fact that the attestation clause is appended by means of a sheet pasted at the end of the will.

The instrument propounded was drawn on a sheet of legal cap, commencing on and covering the first page, which ended in the body of a sentence, passing over the second page, which was blank, the unfinished sentence continuing, and the instrument being concluded, and subscribed by the testator on the third page, which was marked "2d," and to which was pasted a supplementary sheet containing the attestation clause, and the subscribing witnesses' signatures. *Held*, a sufficient execution.

Heady's Will, 15 Abb. N. S., 211,—distinguished.

THE instrument propounded bore date March 14, 1877, and was witnessed by John A. Smith and James C. H. White, and appointed Phillip W. Verlander, executor.

It was drawn upon a sheet of legal cap, commencing on the first page and covering that, passed over the second page, leaving it blank, and continued upon the third page, on the left hand corner of which was marked "page 2d," and concluded on that page, which was subscribed by the decedent. Then a half sheet of legal cap

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was pasted on the bottom of that page, containing the attesting clause, with the signatures of the subscribing witnesses subscribed thereto.

William Collins, a son, filed objections to the probate, which were subsequently withdrawn, except on the question of execution.

On the hearing, John R. Smith, one of the subscribing witnesses, testified that he knew decedent in his lifetime for the last five years; that decedent's signature was attached to the instrument in his presence, and that the other subscribing witness was present; that decedent, to the best of witness's belief, said that it was his last will, and about the last thing he was going to do on earth; that he used the word *will*, and requested him to witness it, which he did in decedent's presence, immediately after decedent had signed his name; that he considered decedent perfectly sound at the time, and free from restraint, and that the other subscribing witness signed at decedent's request.

On cross-examination, witness testified that he thought decedent was sixty-seven or sixty-eight years of age; that the will executed was in witness's handwriting; that he copied it by decedent's request, inclosed it in an envelope, where it remained, he thought, for two or three weeks, when he delivered it to decedent about a week before its execution, in the Morrisania Odd Fellows lodge room, at a meeting of the lodge, before the meeting commenced; that he did not see it after delivering it to decedent until the date of execution; that he thought it was in the same shape when delivered to him as when it was executed; that it was executed at the secretary's desk, about eight o'clock, or a few minutes before; that

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decedent first said he would like to have the matter settled now, holding the envelope in his hand; that witness was the secretary of the lodge; he took the paper out, and witness asked him who would be the other witness, and he said Mr. White, who came into the room as he spoke, whereupon he went to him and brought him to the desk; that decedent signed his name, then witness, and afterwards Mr. White; that decedent, just as he was signing his name, directed his remarks to both the witnesses; that witness was on one side of the desk and Mr. White on the other. Witness, when asked whether the last leaf was pasted on before the execution of the will, testified that he believed it to have been pasted on before the execution, but was not certain; that he thought he pasted it at his house when he made the copy, but was not certain; that he marked the pages when he made the copy. On re-direct examination he testified that after the execution decedent took charge of it, and witness next saw it the evening of decedent's funeral, at his late residence.

James C. H. White, the other subscribing witness, testified that he knew decedent in his lifetime for about twenty years, and on looking at the instrument, testified that decedent's name was subscribed thereto in his presence, and he declared it to be his last will and testament; and that his name as a subscribing witness was written by witness at the request of the decedent, in the presence of the other subscribing witness, and that decedent was of sound mind, and free from restraint; that the first he knew of the matter was the evening when it was executed, when he entered the lodge room. Decedent first spoke to him, and asked him if he would sign his will—

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be a witness to his will ; that they then went to the desk, where decedent signed, then Mr. Smith, and then witness ; that he told witness it was his will after he had signed, and said so when he requested witness to sign ; that decedent said it was his will before he signed his name ; that witness did not notice how the paper was fastened ; that it was fastened as papers usually are ; he thought that he saw nothing unusual in the fastening ; that he did not notice any blank page ; that witness read part of the instrument which he signed ; that he signed it at the request of decedent ; that he did not remember particularly whether his attention was called to the facts stated in the attestation clause ; that he understood his signing that clause meant that he had witnessed the signature of decedent ; that the only time decedent requested him to sign his will, was when witness entered the lodge room, and that he saw enough of it to understand what the instrument was ; that decedent held the instrument in his hands when he met witness on his entrance to the lodge room, and asked him to subscribe as a witness.

On cross-examination he testified that the substance of what decedent said after the parties had reached the desk, was that the instrument was his will.

On re-examination he testified that he was first informed as to the instrument on his entrance, but when they approached the desk, the subject was conversed about ; that it pertained to the will, but he could not remember the language.

The proponent here rested, and the contestant announced that he should offer no testimony on the question of the competency of the decedent, but submit the

case upon the proofs already in, and a brief on the question of execution.

SILAS D. GIFFORD, *for proponent.*

E. P. BROOKS and HUBBARD HENDRICKS, *for contestant.*

THE SURROGATE.—There seems to be no substantial defect in the proof of execution by the subscribing witness Smith, which is full and complete, on his direct examination as corrected by his cross-examination, even if it be assumed that his expression “to the best of my belief” qualified or impaired the force of his testimony. But when his attention was called to this expression on cross-examination, he testified distinctly that it applied to another portion of the decedent’s declaration, and not to the statement that it was his will; and he testifies that these remarks were made when he was signing his name.

The testimony of the witness White seems to be liable to more criticism, and if the other subscribing witness had not been more definite, it would certainly jeopardize the probate of this will; but when he testifies that the only information he received from decedent, that the instrument executed by him and subscribed by the witnesses was his will, was when the witness entered the room and decedent approached him, holding the will in his hand, and the instrument is thus satisfactorily identified, I should regard it as substantially published, so far as this subscribing witness was concerned; and he adds afterwards, that there was a conversation about a will, the substance of which was that decedent said, after he reached the desk for the purpose of signing, that it was his will.

In *Jackson v. Jackson* (39 N. Y., 153), Mr. Justice

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WOODRUFF, at page 159, in commenting upon that subject, says: "The order of the several things constituting one complete execution by the testator, is not material if they are, in fact, done, as nearly as may be, at the same time. Thus the statute requires that the testator at the time of making such subscription shall declare the instrument to be his last will and testament. But this does not make it necessary that the declaration shall be uttered while in the very act of writing. It may be immediately before or immediately after; it is enough if it be on the same occasion and form part of the one transaction."

I entertain no doubt that the proof is sufficient to establish the due execution of the instrument as a last will and testament. The next question to be considered is the manner in which the instrument appears to have been written, leaving a blank on the second page, and also a sheet attached, on which the attestation clause is written. The proof tends to show that the instrument in question is in the same condition that it was when executed; indeed, there is strong internal evidence of that fact, for the sentence commencing at the bottom of the first page is concluded at the top of the third page of the sheet, and shows a clear continuity in the same handwriting; besides, the first page is so marked, and the second written page is also marked as the second page, and is shown to have been written at the time the instrument was drawn by the scrivener who copied from another instrument at the request of the decedent. Under these circumstances, though it is a very careless mode of writing so important an instrument as a will, and affords an opportunity for the fraudulent insertion

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of provisions not drawn to the attention of decedent in an ordinary case, still the continuity of the sentence, and the other proof of the identical condition of the will, as offered for probate and when executed, in my opinion renders it proper that the will should be admitted to probate, notwithstanding the authorities to which my attention has been called, particularly that of Heady's will (15 *Abb. N. S.*, 211), decided by the learned Surrogate of Westchester county, in 1873, in which he is pleased to express the danger of leaving a blank page intervening in the midst of the disposing parts of a will, and cites the cases of *Willis v. Low* (5 *Notes of Cases*, 428); *Smee v. Bryer* (6 *Id.*, 20). But in that case another very serious obstacle to the probate of the will existed in the fact that the attestation clause was written on the fourth page of legal cap, but inverted, and there signed by the witnesses, which he adjudged to be a failure to subscribe the will at the end thereof by the subscribing witnesses, and for which he rejects the same, not passing upon the effect of the blank; both of the cases referred to by the said Surrogate being authorities upon that particular question, and not as to the effect of leaving a blank in the body of the will. The case of *Gore* (3 *Curteis*, 759), was where a will concluded at the bottom of the first page, the second being left blank, and on the third was the attestation clause, at the foot of which were the signatures of the testator and the subscribing witnesses, and it was held that it was signed at the end.

I am of the opinion that under the proof in this case and the continuity of the sentence of the will, from the bottom of the first to the top of the third page. there is

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a sufficient protection against imposition and fraud to warrant the admission of the instrument in question to probate ; and that the instrument propounded was duly executed according to the requirement of the statute, by the testator, when of sound and disposing mind, free from undue influence.

Let a decree be submitted for signature.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
December, 1879.

MATTER OF DUNN.

In the matter of the estate of JACOB DUNN, deceased.

A money judgment entered against a decedent after his death, upon a verdict rendered during his life-time, relates to the time of the verdict, and is a judgment "docketed against the deceased," and entitled to priority of payment, in the course of administration, under 2 R. S., 87, § 27, subd. 8.

It is not necessary that an order be obtained, in such a case, to enter the judgment, *nunc pro tunc*, as of the term prior to decedent's death.

The petitioner having brought an action against the testator for rent due, procured a verdict against him for the amount claimed, the exceptions being ordered to be heard in the first instance at the general term. After the argument, and before the decision upon the exceptions, the defendant died, and thereafter judgment was entered against him for \$702.24, which judgment petitioner asked to have paid as a preferred debt, alleging that the estate was insolvent, and that ample assets were on hand, to make the preferred payment. *Held*, that the judgment was entitled to preference under the Revised Statutes, and,—the allegation of sufficient assets not being disproved,—payment was ordered, subject, however, to the deduction of a certain sum adjudged as costs, against the petitioner, upon an appeal from an order in his action.

APPLICATION to require the administrator to pay a judgment entered against decedent, as a preferred debt.

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The petition set forth that the action in which judgment was ultimately rendered, was for rent due from the deceased to petitioner ; that an action for the rent was commenced against decedent by petitioner in the Superior Court of the city of New York, and that on March 24, 1876, a verdict was obtained for the full amount, and thirty days' time given to defendant to make a case, exceptions to be heard in the first instance at General Term, the entry of judgment being suspended in the meantime ; that the exceptions were argued in November, 1876, and a decision rendered in May, 1877, overruling the exceptions, and ordering judgment for plaintiff on the verdict, with interest and costs ; that judgment was accordingly entered against defendant May 21, 1877, for \$702.24 ; that decedent died about February 12, 1877, after the argument of the exceptions, and before the decision ; that said judgment stands as if entered prior to decedent's death ; that decedent left a will appointing his wife sole executrix, who qualified, and was afterwards superseded, and one Lynch appointed administrator with the will annexed, who qualified ; and that besides other property in his possession, he has about \$12,000 cash, realized from the sale of some of decedent's effects ; that petitioner's judgment is the only one against the decedent, and the estate is insolvent, and that said judgment is entitled to preference under the third clause mentioned in the Statute of Distribution, and that the debts provable under the first and second clauses will exhaust but a small portion of the assets.

The administrator with the will annexed, answering the petition, denied that the judgment in question stands as though entered prior to the death of decedent, or

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comes under the third clause of the Statute of Distribution ; and alleged that he filed an inventory August 10, 1878, and has procured an order to advertise for creditors, which is being published, and does not know whether there are other judgments against the decedent, or that the debts under the first and second clauses of the statute will exhaust but a small portion of the estate ; that petitioner moved the General Term to re-settle the order so as to require the judgment to be entered *nunc pro tunc* as of the term prior to decedent's death ; that the administrator appeared and opposed the motion, which has not been decided ; that the debts of the estate will amount to upwards of \$100,000, and that he is involved in numerous litigations, and cannot ascertain the expenses of executing his trust, or what the net proceeds of the estate will be after their payment and his commissions. He filed a supplementary affidavit, showing that the General Term granted the motion to enter the judgment *nunc pro tunc*, from which he appealed to the Court of Appeals, which court reversed the order, with costs, and on the remittitur, the order of said court was made the order and judgment of the Superior Court, and the costs awarded to him as respondent were adjusted at \$144.40, no part of which has been paid.

W. H. NEWMAN, *for petitioner.*

J. S. LAWRENCE, *for administrator.*

THE SURROGATE.—By section 37, 3 R. S., 95 (6 ed.), executors and administrators are required to proceed with diligence to pay the debts of the deceased, and are directed to pay them according to the order of classes named, the first being debts of preference under the

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federal laws; second, taxes assessed previously to decedent's death; and, third, judgments docketed and decrees enrolled against the deceased, according to the priority thereof, respectively. There seems to be no objection raised as to the regularity of the entry of judgment in this case, and I must therefore assume that it was entered after the death of the judgment debtor, on a verdict obtained in a suit against him before his death, and comes within the provisions of the statute, subdivision 3, above cited.

In *Nichols v. Chapman* (9 *Wend.*, 452), it was held that a judgment might be entered on a warrant of attorney to confess, &c., after the death of the defendant, as of the term in which he died, if the death happen during the term; and if it happen during the vacation, as of the term immediately preceding the death; and that, though the judgment did not bind the real estate of the deceased, it was a debt having a preference, to be paid in the usual course of administration.

By section 8, 3 *R. S.*, 618 (same edition), it is provided that in case judgment recovered shall be filed and docketed within a year of the death of the party against whom it is obtained, the death may be suggested on the record, if it happen before judgment rendered, and if after judgment rendered it shall be certified on the back of the record by the attorney filing it, and that such judgment shall not bind the real estate which the party had at his death, but be a preferred debt to be paid in the usual course of administration. Chief Justice SAVAGE, in *Nichols v. Chapman*, at page 457, well says that "the course of administration among judgments is to pay the oldest first."

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In *Salter v. Neville* (1 *Bradf.*, 488), the case of *Nichols v. Chapman* is cited, and commented upon, the Surrogate saying that "the record itself, when duly made up, related back to the time of the entry of that order or judgment, no matter when it was in fact signed." In *Bernes v. Weisser* (2 *Bradf.*, 212), the same case is recognized as holding that the judgment record after death in such a case gave priority of payment over simple contract debts. It will be observed that there is nothing in subdivision 3 of the section above cited, stating when the judgment shall be docketed or decree enrolled, but the provision is that it shall be against the deceased. The case under consideration comes directly within that provision, for it is a judgment against the deceased, and it must be conceded to have been duly entered as such. *Willard on Executors*, p. 279, etc., discusses this question, and reaches the conclusion, substantially, that a judgment entered against the decedent after his death relates to the time of the verdict, and comes within the provisions of the statute giving it a preference over ordinary liabilities of the estate.

I am therefore of the opinion that the petitioner is entitled to payment of his judgment, as a judgment docketed against the deceased under the 3d subdivision of section 37 above cited ; but I am also of the opinion that inasmuch as, in the same case, judgment for costs was recovered against the petitioner, those costs should be deducted from the amount of the judgment in his favor, and he is entitled to an order directing the administrator with the will annexed to pay the balance of his judgment, as the answer of the administrator does not show

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that he has not ample funds in his hands applicable to its payment.

Let an order be entered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
January, 1880.

LUERS v. BRUNJES.

*In the matter of the accounting of PETER BRUNJES and
LAWSON L. FULLER, trustees, under the will of
HENRY LUERS, deceased.*

The decedent, who, at the time of his death in 1865, was a member of a firm, left a will, disposing of his property for the benefit of his widow, son and daughters, and directing his executors to cause the value of his interest in the firm to be ascertained, and to transfer the same to said firm, upon their executing an obligation to pay the amount, when his son should attain majority, which occurred in 1870. The executors, being members of the firm, allowed the funds of the testator to remain in the business, drawing interest, but omitted to take the obligation as required. In 1875 and 1876, the membership of the firm having changed, and the business having deteriorated, said executors took, from members of the firm, a bond and mortgages upon the firm lands, which were already incumbered, to secure the balance due to the estate. Subsequently their letters were revoked on their application, and administration with the will annexed was granted to the son and daughters, the securities being transferred to the administrators. It appeared that the beneficiaries were unaccustomed to business,—the mother being only partly acquainted with the English language,—and that they had no sufficient notice, at the time, of the breach of trust on the part of the executors, the securities being taken after the estate had become manifestly imperiled.

Held, 1. That the executors had no right to speculate upon the result of a plain neglect of their duty, and were liable for the loss growing out of such neglect.

2. That the beneficiaries, under the circumstances, were not estopped from holding the trustees liable, by the receipt of income, nor by the ulti-

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mate acceptance of the custody of the estate, and the transfer of the securities. The essence of an estoppel is that a person has done or omitted to do something, which has induced a line of conduct by another, the denial of which thereafter would injure the rights of the one acting upon the representations or silence of him who seeks to enforce the liability against him.

Where a trustee claims a confirmation, by the *cestui que trust*, of the former's unlawful acts, in dealing with the estate, the rule is that the party confirming must not labor under any disability, must act deliberately, upon full information, without false suggestion or reservation on the part of the trustee, and must be aware of the law that he might impeach the transaction in a court of equity.

THIS was an accounting of Peter Brunjes and Lawson L. Fuller, trustees under the will of decedent.

The latter died in 1865. By his will he appointed said Brunjes and Fuller executors, and directed that his interest in the firm of Brunjes, Ockerschausen & Co., of which he was a member, at his death, should be ascertained and sold by the executors to the surviving members thereof, on their executing to the executors an obligation to pay the amount of his interest, so ascertained, when his son Henry, who, with his mother and sisters, were the beneficiaries, should become of age, which occurred February 1, 1870.

In 1867, the executors rendered a final account of their proceedings as such, and a decree was entered, on June 10, directing them to invest and keep invested the sum of about sixty thousand dollars, according to the provisions of the will. In May, 1877, their letters were revoked, upon their own application, and they were released from the trust imposed by the will, and letters of administration, with the will annexed, were granted to the son and daughters who petitioned for this accounting, and prayed that the executors personally make good the loss occasioned by the failure,

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hereafter mentioned, to enforce the obligation of the firm to the estate, according to the terms of the will.

Subsequently to decedent's death, the executor Fuller became a member of the firm of Brunjes, Ockerschausen & Co., which firm carried on a sugar refining business in New York city, their capital consisting of the refining building and the lands on which it was situated, subject to mortgage incumbrances, and the business being carried on, as the auditor found, by buying crude sugars on credit, and selling for cash, or on short credit, whereby they were enabled to meet their obligations for the purchase of the crude material.

After the entry of the decree of 1867, the executors charged themselves with the balance of \$63,110.54, and commenced their new account, and continued it to November 1, 1876, during which period, exclusive of said balance, they received the further sum of \$44,503, the whole amounting to \$107,613.54, and during the same period paid to the petitioners a portion of the capital of the estate, and all the interest due thereon, leaving a balance November 1, 1876, of \$38,110.52, which up to that time had continued in said firm. About May 1, 1875, the executors took from Peter Brunjes and Henry J. Ockerschausen, members of said firm, a bond in the penal sum of \$76,000, conditioned for the payment of \$38,000 five years from May 1, 1875, with interest at seven per cent., payable semi-annually, and as collateral thereto a mortgage thereon, of the same date, on lots in this city, and about February 16, 1876, as further security for such payment, they executed to the executors another mortgage on other lots, all of which real estate was, with a slight exception, encumbered by first mort-

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gages to the amount of \$67,311, the two mortgages executed to said executors covering all the real estate owned by the said firm, except that there was a mistake in the description of one of the lots.

This additional mortgage, called the blanket mortgage, taken to secure the \$38,000 bond, was, as the beneficiaries' counsel notified the executors, taken for such security as it might be worth, and the said bond and two mortgages to the executors were the only obligations that they took from said firm for the payment of the testator's interest, in pursuance of the provisions of the will. In May, 1877, the executors assigned said bond and mortgages to the petitioners, as administrators with the will annexed, and they were received by them as such.

The trustees' account, and objections filed thereto, were referred to an auditor, who took testimony, and reported that the trustees were not personally liable for loss to the estate, and that the petition should be dismissed. The matter came up for a hearing, on exceptions to the report. Further facts sufficiently appear in the opinion.

HORACE SECOR, JR., *for executors and trustees.*

ELLIOTT F. SHEPARD, *for exceptants.*

THE SURROGATE.—It is not only proved but conceded that the executors, who are accounting, after ascertaining the value of the interest of the testator in the firm of Brunjes, Ockerschausen & Co., transferred, according to the terms of the will of decedent, all his interest in said firm, but failed to take the obligation of that firm to pay the amount thus ascertained, at the ma-

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jority of the son, February 1, 1870, according to the requirements of the will; and hence the only questions to be considered and determined are: has the estate suffered loss by reason of that neglect of a plainly imposed obligation, and if so, have the beneficiaries under the will done anything, by way of acquiescence or waiver, which estops them from charging the executors with the loss caused by their neglect of duty?

Some evidence has been given by the executors, tending to show that the firm of Brunjes, Ockerschausen & Co., at the death of the decedent, while it was in good credit, was largely indebted, and if then closed, the debts would have exhausted the whole property of the firm, and also that, at the time when the obligation, if it had been taken according to the duty of the trustees, would have matured, the firm was not in condition, if wound up, to have realized sufficient to pay the obligation; but the evidence is quite conclusive that at both periods the firm was in active business with a good credit, and that if the obligation had been outstanding at the latter date, it would have been paid. It also appears that, about a year after a transfer of all the interest of the decedent in the firm to the surviving partners was made, one of the firm, Hermann H. Brunjes, retired therefrom with \$110,000 of its cash assets, and that the respective copartners after one of the trustees, Fuller, had become a member of the firm, had yearly withdrawn from the firm sums running from \$3,000 to \$12,000, each, amounting to \$175,000; besides, there is no proof in the case as to the personal responsibility of said Hermann H. Brunjes, at the time when the obligation would have matured if taken according to the duty of the executors.

If this obligation had been taken, the personal liability of all the then partners for this claim, as well as the assets of the firm, would have been held for the payment of the obligation ; and the neglect of the executors to take that obligation clearly deprived the executors of the power to enforce it on the first day of February, 1870, and thus a loss to the estate occurred by neglect of the executors to do their duty ; for it is not pretended but that the obligation would have been entered into, if it had been demanded by the representatives of this estate ; and if not, then certainly the executors would have been in a position to enforce a liquidation of the affairs of the firm, which obviously would have been seriously detrimental to the surviving partners, and have doubtless secured the execution of the obligation.

It is no answer to say, as one of the executors and trustees assumed to swear, that they did not take the obligation because they regarded it as a lien upon the property of the firm, and therefore equally well secured ; *first*, because it was a plain violation of duty to neglect to take it ; and in the *second* place, their assumption that it was a lien upon the effects of the copartnership was not true in any legal sense, neither as an actual nor as an equitable lien, which could have been enforced against the other creditors of the copartnership, or *bona fide* purchasers of the real estate. And besides, if it had been such lien, there was an essential failure to comply with the provisions of the will, in that the surviving partners were not thereby made personally liable for the obligation. It is clear, therefore, that the executors should be charged with the loss sustained by reason of this neglect, unless they have been relieved from the

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obligation by some action of the beneficiaries ; but the extent of that loss cannot yet be determined, for the reason that, for the purpose of security, the administrators with the will annexed hold certain mortgages, which may yield something for the benefit of the estate and the protection of the trustees. This brings me to the consideration of the testimony bearing upon the alleged estoppel, by acquiescence or otherwise, of the beneficiaries, and the release of the trustees.

The evidence shows, substantially, that the beneficiaries,—the widow being above sixty years of age, not able to write English, nor acquainted with accounts or business, and the two daughters, alike unacquainted with business,—received from the executors the interest on the amount estimated as the value of decedent's interest in the firm of which he was a member. And it may be reasonably assumed that they understood the terms of the will requiring the execution, by the surviving members of said firm, to the executors, of the obligation. But it is worthy of special notice that there is no evidence in this case that they received interest from, or had any dealings with the surviving members of said firm, except as executors ; and I am not able to find any evidence in the case showing that they, the female beneficiaries, or Henry T. Luers, after he became twenty-one years of age, had any knowledge that the executors had failed to take the obligation, pursuant to the terms of the will, until about the time they took proceedings to compel further security, through their counsel, Mr. Shepard. And while it does appear that they had some sort of knowledge, that the firm of Brunjes, Ockerschausen & Fuller had executed the first mortgage to the

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executors, some time in 1876, by the mortgage being exhibited to the widow, and taken into the hands of the daughters, yet it does not appear that they understood the nature of the mortgage, whether it was or not a first and perfect security, and there is nothing in the case to indicate that they did not, as they had the right to, assume that the obligation of the firm had been taken, and that in pursuance of their duty the trustees had invested the money in security, upon property belonging to the firm; and they had the right, under the circumstances, to assume that that mortgage was given and taken in conformity to the obligation of the will, and were not charged with the duty of examining to see whether that security was ample or otherwise, for that duty was imposed upon the trustees, as their representatives. Nor am I able to concur in the suggestion that, acting for himself and the other beneficiaries, Mr. Luers, after his majority, did anything to acquiesce in the plain neglect of duty on the part of the executors; indeed, the very essence of an estoppel is, that a person has done or omitted to do something, which has induced a line of conduct by another, the denial of which thereafter would injure the rights of the one acting upon the representation or silence of him who seeks to enforce the liability against him; and it is quite pertinent in this case to inquire what young Luers has done, in receiving interest from the late firm, through the executors or trustees, which has induced the executors to do, or neglect to do, what they would not, or would have done, but for such conduct on his part. It is nowhere suggested that they omitted to take the obligation under the direction or approval of either of the beneficiaries, nor is it pretended

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that they omitted to seek further security from the firm, by reason of the neglect of the beneficiaries to demand it, or by reason of acquiescence in the fund remaining in the hands of the copartnership, without such obligation. Indeed, the evidence is quite conclusive that they did not so understand, nor were they apprized of the fact that the fund was left with the surviving partners without their obligation to pay at the majority of Henry Luers, or afterwards without security; and the fact that they received interest from the executors in the shape of checks of the firm, was no notice to them that the obligation had not been taken by the trustees, nor any that the fund had not been properly invested, according to the terms of the will, after February 1, 1870. So that, in respect to the first mortgage taken by the trustees, it must be held to have been taken upon their responsibility as such; and if they claim that it was an investment, pursuant to the provisions of the will, instead of an effort to secure what they might, notwithstanding their neglect to obtain the obligation, it was a security not authorized, upon property which had been incumbered by mortgages prior thereto, and for that reason they are liable for mis-investment.

The next question to be considered is whether the so called "blanket mortgage," required by the beneficiaries' counsel, was such a dealing with the property by the beneficiaries, as to relieve the trustees from any further liability for their previous neglect. The mere receipt of the mortgage under such circumstances would not, in my opinion, act as a release, either legally or equitably, of the trustees, for such neglect of duty, even if the mortgage had been received by them in

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the expectation that it would prove ample security for the whole liability. But the proof is quite conclusive that the second mortgage, called "the blanket mortgage," of date February 16, 1876, was given on the request of the counsel for the beneficiaries, not in release of the trustees' liability, nor was it received in satisfaction of any such liability, but it was demanded by the counsel as the best that could be procured under the circumstances, they refusing to give other security; and the fact that the members of the firm and the trustees proposed to convey the whole property, thus mortgaged, to the administrators with the will annexed, subject to all incumbrances, for a release of the firm and the trustees from all liability, and that it was rejected by the beneficiaries, is the highest evidence, if any other were needed, that the blanket mortgage was not received in satisfaction.

It is true that the executors claim that they are released from further liability, by the acquiescence of the beneficiaries, through the acceptance of the custody of the estate, and their approval of the receipt of the so called "blanket mortgage;" but, as has already been stated, the evidence does not sufficiently charge the beneficiaries with a knowledge of the facts and the trustees' liability.

In *Cumberland Coal and Iron Company v. Sherman* (30 Barb., 553), Mr. Justice DAVIES, in discussing the question of ratification or confirmation of a sale to a trustee by the *cestui que trust*, which is somewhat analogous to the pretended acquiescence and confirmation in this case, says, that the rules as to confirmation are, that the party confirming must not labor under dis-

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ability, that the confirmation must be a deliberate act, and that the court will watch it with the utmost strictness, and will not allow it to stand, but on the very clearest evidence; that there must be no false suggestion or reservation, but that the *cestui que trust* must be made acquainted with all the material circumstances of the case; that the confirming party must be aware of the law,—that he might impeach the transaction in a court of equity,—citing numerous authorities.

In *Adair v. Brimmer* (74 N. Y., 539),—which is a case where the executors had disposed of the testator's real estate for the purpose of forming a mining corporation, and received stock of the corporation in payment therefor,—there was an effort made to show that the *cestui que trust* had ratified the sale and investment; but the same doctrine was asserted, and the executor held liable.

The confirmation of the conclusions reached by the auditor would, in my opinion, establish a most dangerous and pernicious precedent, for it would seem to invite trustees to speculate upon the result of a plain neglect of duty, and to impose upon the *cestui que trust* not only proof of the violation of duty, but in order to establish the loss growing out of such neglect, to throw the *onus* upon them of showing that, if the duty had been performed, and the obligation taken in conformity to the will, that obligation could certainly have been enforced to its full extent, by strict process of law. I am not willing either to establish or concur in any such principle. I am, therefore, of the opinion that the trustees are chargeable personally with the loss which has been sustained by this estate, by reason of their

KAVANAGH v. WILSON.

neglect to take the obligation, and enforce it according to the provisions of the will. Nevertheless, they should be credited with all sums which have been realized through the executors and trustees, from the late firm of Brunjes, Ockerschausen & Co., and the amount of such loss, it seems to me, cannot be determined unless by consent of parties, without the foreclosure of the subsisting mortgages executed to the executors, and assigned to the administrators with the will annexed. The auditor's report, in the particulars above suggested, should be modified to conform hereto, and the exceptions to his conclusion that the trustees are not liable, and that the petition should be dismissed, should be sustained.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SHERIFF.—
September, 1880.

KAVANAGH v. WILSON.*

*In the matter of the estate of ALEXANDER C. POILLON,
deceased.*

In proceedings to sell a decedent's real estate, for the payment of debts, a judgment for a debt due from him, entered on an offer of his executors, against whom the action had been revived, is not evidence of the debt, as, in such case, there is no trial on the merits. Nor is the offer competent evidence, as constituting an admission thereof.

The costs awarded in such a judgment are not a valid part of the claim, for the purposes of such proceedings.

Wood v. Byington 2 Barb. Ch., 887; Sanford v. Granger, 12 Barb., 892;—followed.

* See Swartout v. Schwerter, *post*, p. 497.

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MOTION to confirm report of referee appointed, in creditor's proceeding to sell decedent's real estate for the payment of debts, to take proof of a certain judgment recovered in the name of John Kavanagh against the executors, and of the rights and interests of certain parties, in and to said judgment.

An action was commenced in the court of common pleas, by John Kavanagh, for brokerage fees, against the decedent, in 1873, and upon the latter's death, was revived against his executors on December 14, 1874. In May, 1876, a judgment was recovered therein against the executors for over \$5,000, which, after affirmance by the General Term, was reversed by the court of appeals, January 27, 1877, and a new trial ordered, which was not had. In February, 1880, the executors offered to allow plaintiff to take judgment against them as such, for \$2,500, with interest and costs, which offer was accepted and the judgment entered accordingly.

Upon application for distribution of the proceeds of a sale of the decedent's real estate, had pursuant to an order of the Surrogate, this reference was ordered, whereon the referee allowed the judgment as a valid claim, but disallowed the costs. Various exceptions were taken by the several parties.

WILLIAM J. KANE, *in person, and for John Kavanagh and C. N. Dayton.*

GIDEON W. DAVENPORT, *for petitioning creditor.*

C. C. EGAN, *for assignee of John Kavanagh.*

NELSON SMITH, *for receiver of John Kavanagh.*

THE SURROGATE.—By section 60 of 3 *R. S.*, 117 (6 ed.), it is provided, in such a case as this, that a judg-

ment against the executors, for a debt due from the deceased, leaves the debt against the estate to the same extent as before, to be established in the same manner as if no such judgment had been obtained, except when the same has been obtained upon a trial or hearing upon the merits, in which latter case the judgment is *prima facie* evidence of such debt before the Surrogate.

In this case, there has been no trial on the merits which produced the judgment offered in evidence, for the former trial, though on the merits, was by the reversal in the Court of Appeals entirely set aside, and none of its proceedings constituted any portion of the record of the judgment entered on the defendant's offer.

The next question to be considered is whether the debt against this estate was established before the referee, in the same manner as if no such judgment had been obtained. There is no proof of any such debt, outside of the judgment, unless, as the referee seems to suppose, the offer of judgment under the Code was equivalent to an admission of the indebtedness by the executors. This is substantially a proceeding against the property of the heirs, and I am of the opinion that the offer of judgment under the Code, in a suit against the executors was not equivalent to an admission that the estate was indebted to the plaintiff in that action—even if it had been proved before the referee that the offer was signed in the proper handwriting of the executor's attorney. But the only verity as to the offer is that it appears in the judgment roll and purports to have been signed by the executor's attorney. This, in my opinion, is not a sufficient proof of the debt against the estate.

By sections 68 and 69 of the same statute, p. 119, the subsequent proceedings, after the order to show cause, are required to conform to the proceedings taken on the application of the executor or administrator, and hence the proof of demands, to be adjudged valid and subsisting against the estate of decedent, must conform to the requirements of section 17, p. 110, and be established by proof independent of any judgment recovered against the representative of the estate, unless such judgment shall have been recovered upon a trial on the merits.

The reference back to the referee to take proof of the demand of the parties claiming an interest in the judgment, together with their respective rights, appears by the order as upon the original establishment of demands against the estate; whereas the papers show such an establishment, the usual order for sale, and the actual sale and report thereof. The proper order to have been made would have been under sections 51 and 52, p. 116, for the proof, to the satisfaction of the Surrogate, of any other debts or demands which had been presented and not theretofore established. The proceedings stand in the anomalous position of the sale having been made before completion of the hearing to adjudge the demands subsisting against the estate.

As it is probable that the parties interested in this judgment may be able to prove the claim or debt, for which the judgment was entered by consent, they should be afforded the opportunity before the same referee, to whom the matter is hereby referred (as upon proceeding for distribution), if they shall so elect.

There having been no proof of the claim represented by the judgment, it seems unnecessary to consider the

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referee's report and exceptions thereto, as to the interests of the respective claimants or their rights under the proof, except that of Mr. Kane under his alleged lien for costs, which, under the authorities, cannot be sustained as a demand against the decedent (*Wood v. Byington*, 2 *Barb. Ch.*, 387; *Sanford v. Granger*, 12 *Barb.*, 392; *Redfield's Practice*, 258).

But in reaching this conclusion, I do not intend to hold that the attorney may not have a valid claim for so much of his professional services as were performed before the death of the testator, which, if not barred, he will have an opportunity to prove before the referee.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
October, 1880.

SARVENT v. HESDRA.

*In the matter of the probate of the will of CYNTHIA
HESDRA, deceased.*

The decedent lived with her husband for many years, without any evidence of alienation or discord, and died, leaving no parents or children. Several months after her decease, a paper alleged to have been discovered was propounded by her husband, as her will, whereby she left all her property to him. Evidence was adduced that this was in pursuance of an understanding had between them during her life-time. The probate was contested by various relatives of decedent who would have been entitled to share in her estate in case of intestacy, and who attempted to prove that the signature of the testatrix, and of a deceased subscribing witness, were forgeries. The draughtsman, who was the surviving subscribing witness, did not at first recollect drawing and witnessing the will, but recalled the facts, from the statements to him of another who was present at the time, and from a memorandum in

his diary. A great number of witnesses was examined upon each side, including two experts in handwriting, who testified against the genuineness of the contested signatures, but arrived at their conclusions by inconsistent theories. *Held*, 1. That the delay in producing the will was not necessarily suspicious, when explained by decedent's condition and associates, in her life-time.

2. That contestant's theory, that the forgetfulness of the draughtsman of the will was simulated, in order to give a semblance of verity and genuineness to a forged instrument in his own handwriting, was not tenable, as such forgetfulness was rather calculated to endanger the case, while a ready statement of the facts of drawing and witnessing the will would have been the most obvious mode of averting suspicion.
3. That the case turned upon the conflict between these experts and the draughtsman, and that as he had lived for many years in a community where he was well known, and had served as a justice of the peace, and in other capacities, and testified positively to all the facts of execution, and was corroborated by a memorandum in his diary and another witness, and no attempt had been made to impeach his character, his testimony must control, and the instrument be admitted.

Conversations and dates, given from memory, are a kind of testimony which is apt to be unreliable, the conversations being often very imperfectly remembered, and the modes of expression misunderstood in their significance; and should not, alone, be regarded as controlling.

The testimony of a witness, to the actual signature of another in his presence, is not necessarily sufficient to overcome all evidence tending to a contrary conclusion, based upon the opinion of witnesses, familiar with the handwriting in question, as to its genuineness.

Testimony as to similarity of signature is much more persuasive and satisfactory than evidence of dissimilarity, it being the uniform experience that the signatures of a person often vary materially, owing to such causes as posture, nervous condition, freedom from interference, quality of material, and other circumstances.

The testimony of experts who are selected by the party in whose behalf their testimony is given, and whose testimony in his favor is assured beforehand, falls short of that impartiality which characterizes ordinary witnesses, and requires to be scrutinized with care.

Expert testimony as to handwriting is especially open to criticism, there being a lack of any standard, such as exists in the case of the medical or chemical expert, whereby to test the soundness of the opinions advanced.

It is improper to assume the criminality of a witness for the purpose of meeting coincident evidences of corruption, or of explaining apparent dissimilarity or contradiction. The rule is to assume the honesty of the witness, until either his testimony is shown to be so inconsistent as to impair his veracity, or his general character for truth and honesty is successfully attacked.

APPLICATION for the probate of a will.

The will propounded bore date August 17, 1876, and purported to be witnessed by Peter Stephens and I. W. Canfield. After providing for the payment of debts, testatrix gave and devised all the residue of her property, both real and personal, of every kind and nature whatsoever, to her husband, Edward H. Hesdra, forever, and directed that he cause to be erected on her grave a decent and suitable tombstone, and keep the grounds of the plot in good order, and appointed her husband sole executor.

The probate was contested by Margaret Sarvent, decedent's sister; Ann C. Truax, a niece; Catherine A. Jeffrey, a niece; Mahalah C. Green, a sister; Dorcas J. Holmes, a niece; Mary J. King, a niece; W. H. G. Harley, a nephew; Hattie Washington, a grandniece; and A. W. G. Harley, committee, &c., of Augustus Harley, a nephew, a habitual drunkard; but no particular grounds of objection were stated.

Evidence was given to the effect that the testatrix, who was a married woman, living with her husband in New York, having no children, died February 9, 1879; that the will, though searched for by her husband, both at Nyack, where they sometimes staid, and at New York, was not found until about May 1, following, when he discovered it in a drawer of a bureau, at her residence, in a sealed envelope, among other papers, and took it to the office of his lawyer, Mr. McAdam.

The opposing parties examined thirty-eight witnesses, further particulars of whose testimony sufficiently appear in the opinion; except that of Abraham Eugene Hesdra, who testified, for proponent, that he was

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a clerk for one Newcomb, a banker and broker; that he was not related to proponent; had been with him at Nyack in the spring of 1879, nearly every Sunday after decedent's death; had never brought away any papers in connection with proponent; thought it impossible for proponent to have packed up papers without witness's knowledge; and that he heard no such conversation as was testified to by Emma D. Edwards, that Mr. Hesdra was to be brought to court about a will, because he, Eugene, did not know how to make it.

QUENTIN MCADAM, *for proponent.*

CURRAN & LINCOLN, *for contestant Green.*

WILLARD PECK, *for contestants Holmes and King.*

FIELD & DEYO, *for contestants Sarvent, Jeffrey and Truax.*

F. L. WESTBROOK and GEORGE W. WINGATE, *for contestants Harley.*

THE SURROGATE.—It is conceded that the testimony in this case sufficiently establishes the due execution of the will by the decedent, unless the proof warrants the conclusion that the signature of the decedent, and of the witness Canfield, are forgeries.

The circumstances which are alleged to militate against the genuineness of the instrument propounded are:

First. The long time which intervened between the death of the decedent, and the alleged finding of the instrument.

Second. The improbability of its being found, as stated by the proponent on the stand, after the examination of the papers by him in conjunction with Mr. Titus, and of Mrs. Truax; the former, however, stating that he aided in the examination of but one of the drawers, and

that they looked over but about a third of the papers in that drawer ; while Mrs. Truax swears that, the day after decedent's burial, she and proponent looked over all the papers in all the bureau drawers ; that she examined them then and the next day ; and she states that she looked them over half a dozen times, and found nothing like the package in which the will was found.

Third. The numerous contradictions of the proponent, in respect to where he found the instrument, and the circumstances attending it ; that, as Mrs. Truax testifies, he brought some papers down from Nyack on the Monday before May 1st, and told her that he had found the will which gave all to him in a broche shawl ; the fact, however, as he testifies, being that he took the papers down to Mr. McAdam on the first day of May (it appears that they were taken the day before, as the will was opened at the Surrogate's office on the first of May) ; that he told Mr. Garnett, on Monday, after he had been to Nyack, that he had found a will tied up among papers which had been previously looked over—he couldn't say where he found it, but he then stated that the will gave all to him ; while the proponent's testimony is that he knew nothing of the contents of the will until after it had been opened, after being found by Mr. McAdam at his office, on the last day of April ; that he told Mrs. Jeffrey that he looked over all his papers at the house, then went to Nyack to search ; and Mr. Garnett also testified that proponent told him that he found the instrument in a cloth among some papers, and told Mrs. Jeffrey that Eugene Hesdra had found the will in a drawer, and Mr. Truax that he found it in an old band-box at Nyack, and that on one occasion he told him,

showing decedent's signature in a book, that it was her signature, and that the world couldn't counterfeit it; that he said to Mrs. Edwards, in the presence of Eugene Hesdra, that they were going to have him down to court about the will, because the young man (pointing to Eugene) didn't just know how to make a will; and witness testified that this remark was made laughingly.

Fourth. That Mr. Hesdra, after asking Mr. Titus to aid him in searching for a will the second time, put the papers away after he had gotten them out, and made a proposition to him to draw a will, saying it would be worth \$2,000 to him, and he could occupy his house free of rent, and act as his agent, etc.

Fifth. That Mr. Stephens, the surviving subscribing witness, failed to remember the fact of the drawing, execution, and witnessing of the will in question, and failed to recognize his handwriting, when it was exhibited to him at first, in the body of the will.

Sixth. That, by several witnesses, it is shown that the signature propounded is not the genuine signature of the decedent, and that the name of the subscribing witness, Canfield, is also a forgery.

Seventh. That the entire instrument, including the signatures, was written by Mr. Stephens, as evidenced by the similarity of the writing, and that the signature Cynthia Hesdra, to the instrument, appears to have been executed after the paper had been folded and creased, while that of Mr. Stephens, written across the same crease, apparently, must have been written before the crease was made, and that those facts were evidence of the falsity of the signatures. That the signature of Canfield was simulated, and that of Cynthia Hesdra traced.

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The delay in the production of the will, under proponent's explanation, does not seem to me to excite suspicion, when the condition of decedent, in life, and her associates are taken into account. As to the thoroughness of Mrs. Truax's examination of decedent's papers, the testimony of proponent and hers is contradictory; and as she exhibits considerable feeling, and is an heir contesting, her testimony, like Mr. Hesdra's, should be scrutinized with reference to their interest in the result.

The inconsistencies in the statement of Mr. Hesdra, in respect to the manner and circumstances of finding the instrument, naturally excite suspicion, and yet those inconsistencies are sworn to by persons interested in the contest, with the exception of the Reverend Mr. Garnett, and are contradicted by Mr. Hesdra.

The theory of the contestants is that it was a part of a corrupt device to produce this will, to have it found among the papers of decedent carried to Mr. McAdam, a gentleman of high repute in the profession, and he to discover it in order to give character and verity to the proceedings. Now, if there was any such device, it is hardly conceivable that Mr. Hesdra was kept in ignorance of the scheme, while he was to act a part in conveying the papers to Mr. McAdam, especially as it must be assumed that whatever was done in the premises must have been done at his instigation, as well as for his benefit, for it is inconceivable that Mr. Stephens should have devised any such scheme without being instigated thereto, and largely rewarded by Mr. Hesdra therefor; and yet it is claimed that, while the instrument appeared to be securely sealed up, and before it had been carried to the office of Mr. McAdam, the fact of its discovery

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and its provisions were voluntarily and suggestively disclosed by Mr. Hesdra to several persons, who were especially interested in denying the existence of any such instrument.

The testimony of Mr. McAdam shows that the papers of decedent, which were taken to his office, were taken there under his direction, and it clearly appears that the instrument in question was carried by Mr. Hesdra to the office among other papers on the last day of April, 1879, which was Wednesday, and that in the after part of that day he examined them and found the instrument in question, which he did not open, and then wrote to Mr. Hesdra, who called the next day, Thursday, May 1st, to whom he exhibited the package, including the closed envelope, unopened, and that by arrangement, before it was opened, they went to the Surrogate's office, where it was opened by the probate clerk in the presence of the respective parties.

Where conversations or dates are given by witnesses, it is a kind of testimony which is liable to be unreliable, being stated from memory, which is so often at fault; and it is a very common experience of those dealing with human testimony that conversations are very imperfectly remembered, and that modes of expression are often misunderstood in their significance; and while such conversations as are charged upon the proponent in this case, with other suspicious circumstances, should be considered, alone they ought not to be regarded as controlling.

The testimony of Mr. Titus respecting the proposition to draw a will, which is contradicted by Mr. Hesdra, is a circumstance which might be well considered as show-

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ing the fraudulent disposition of Mr. Hesdra, and his desire to obtain the property belonging to his wife, even at the risk of procuring a forged instrument ; and if true greatly impairs the value of the testimony given by him in this case, if it does not discredit it.

It is claimed by contestant's counsel, as I understand his argument, that Mr. Stephens' forgetfulness of the instrument and the handwriting of the body of the will is a mere pretext, for the purpose of giving a semblance of verity and genuineness to a false and forged instrument, executed by himself subsequent to the death of decedent, and after diligent search had revealed that she had left no will ; but it would seem that such a forgetfulness would throw suspicion upon the transaction, and endanger the case, as he must have known that the numerous persons, who were doubtless familiar with his handwriting, would afford an easy mode of proof that the body of the will was in his handwriting ; and if he had, under the inspiration of Mr. Hesdra, forged this instrument, it would seem that his prompt and ready statement that he drew the instrument, and acted as one of the witnesses, and that Mr. Canfield was the other, and that it was drawn under the instructions of the decedent, at her request, would have been the most obvious mode of averting suspicion from the transaction, while his expression of ignorance as to the handwriting of the body would seem to have been a circumstance well calculated to provoke inquiry.

The testimony, which is claimed by the proponent to sustain the genuineness of the instrument propounded, is, in substance : *first*, that of Mr. Hesdra, that he found the same among the papers of the decedent, after dili-

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gent search; *second*, that of Mr. Stephens, one of the subscribing witnesses, who testifies to the fact that his recollection has been so refreshed that he recalls the circumstance, that on the day prior to the execution thereof he met decedent at Nyack—where she was accustomed to visit, and live part of the year—with two children in her company, whom she directed to pass on; and she requested him to draw her will, and stated that she desired to give everything to her husband, and to provide for the erection of a tombstone over her remains, and keeping of the burial-plot in order; and that she had agreed with her husband to give him all her property, and he was to give her all his; and that accordingly he made an appointment for her to meet him at his office the next day, at one o'clock, and that in pursuance of that appointment he made an entry in his diary, under date of the 17th, next day, to meet decedent at the office, “to witness paper—get another witness;” but he testifies that he has no independent recollection of the execution of the instrument the next day, but relies upon the fact that his signature as a witness is subscribed, and to his uniform custom in the execution of such instruments; and that his attention had been called to the subject by Mr. Dorfner, a constable, residing at Piermont, who informed him that, about the time the instrument bears date, he was at Nyack—saw Mr. Stephens, whom he met on the street, and Mrs. Hesdra, and Mr. Canfield—that they three then proceeded to the office of Mr. Stephens, and that, after waiting a while, he went up-stairs to the office, and there saw them together—Mr. Stephens was apparently writing, sitting behind a desk, and he was told by him that he was engaged—that

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he then went out of the office—that he recollected Mr. Stephens' stating, before he had met decedent and Mr. Canfield, that he had a sheriff's jury to swear in at one o'clock, which conforms to the memorandum in his, Stephens', diary of that date. Mr. Dorfner testifies, in substance, to the occurrences as stated, though, as to some minor points, they differ in the details of the circumstances.

This testimony is corroborated by several witnesses, who testify to their familiarity with the signatures of Mrs. Hesdra and Mr. Canfield, which are disputed—that they are the genuine signatures of the decedent and of Mr. Canfield, who is now deceased; and so far as the testimony of witnesses familiar with the signatures of decedent and of Mr. Canfield is concerned, the evidence of their genuineness preponderates over that against such genuineness; while two experts called by the contestant, claiming to be such, and able to determine whether a signature is simulated, traced or genuine, have been examined and cross-examined fully upon the subject, and they both express the opinion that the signature of Mr. Canfield, as a witness to the will, is simulated or forged, and that that of the decedent was traced over the genuine signature, and that from a careful analysis of those signatures, and the body of the instrument, they are of the opinion that they were all written by the same hand, and that they correspond with the genuine signature of the witness Stephens, so as to show, in their opinion, that he wrote the entire instrument.

The two experts have given in detail the reasons why they entertain the opinion, that the same hand which wrote the body of the instrument wrote the name

of Canfield, and of the decedent, to the will, by pointing out what they claim to be similar letters, pen pressure, slope, curves, and general characteristics, but which, so far as I am able to observe, from the most careful examination, falls short of satisfying me, that upon such a comparison it would be safe to conclude that the same hand wrote them, unless great weight is given to the opinion of those experts, which does not appear to be sufficiently corroborated by the illustrations, which they furnish as the basis of that opinion.

The expert Southworth testified that, in his opinion, the name of the decedent, to the instrument propounded, was traced over a genuine signature, while the expert Cresson is of the opinion that only the "Cy" of the decedent's first name was traced, and the balance simulated, but yet they both point out numerous alleged similarities found in the signature of the decedent with similar letters in the body of the will ; which seems to me to be a contradiction, provided the testimony of Mr. Southworth be true, that the signature was traced ; for, if traced, then it is clear that the size and style of the letters in the signature, the space between the letters, curves, and loops, would all concur with the genuine writing of the decedent, since the tracing of a signature, if it be even indifferently done, would have the characteristics of the real signature, and not by any means those of the person who traced them, as the object of tracing is to catch all those peculiarities and characteristics of the handwriting.

It is also worthy of especial note in this connection, that the expert, Cresson, particularly states that the only characteristics of the genuine signature, given in

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evidence, of Cynthia Hesdra, which enables him to distinguish them from that of the will, are the letters "s," "r," and "d," in Hesdra ; he states, when his attention was particularly called to the subject, that the "r" in Hesdra is of the same kind of letter as that in the same name in the body of the will ; while an examination of the letter in those several names shows to the unpracticed eye an entirely different style of "r" from those in the body of the will.

Counsel for the contestant have indulged, by way of argument, in a theory of Mr. Stephens' criminality, which harmonizes with the appearance of the paper, the motive of Mr. Stephens in failing to recognize the body of the will as his handwriting, his failure to remember the circumstance of the will being drawn and witnessed by him, and what the experts think is evidence, that Mr. Stephens' signature was made after that of Canfield, and before that of decedent to the will ; but it is a question of very serious consideration, whether counsel have a right to assume the criminality of a witness for the purpose of meeting what he is pleased to call coincident evidences of corruption, and as a means of explaining apparent dissimilarity or contradiction ; indeed, I think that the true rule is always to assume the honesty of a witness until his testimony is either shown to be so inconsistent as to impair its veracity, or until his general character for truth and honesty shall be successfully attacked.

I cannot concur with the counsel for the proponent, in the opinion, that the fact that Mr. Stephens testifies to the actual signature of Mr. Canfield and of the decedent, is sufficient to overcome all evidence tending to a con-

trary conclusion, based upon the opinion of witnesses familiar with the handwriting, as to their genuineness; for if such a principle should prevail, the proof by a living witness of the signature of a decedent, claimed to have been made in the presence of the witness only, would place the matter beyond the reach of contradiction or discredit, and foreclose all possible inquiry upon the subject. But I fully concur in the authorities cited by the counsel, that the force to be given to the testimony of similarity of signature is much more persuasive and satisfactory than that resulting from evidence of dissimilarity; for it is the experience of all business men that persons often vary materially in their signatures, depending sometimes upon the character of the pen, quality of paper or ink, and nervous condition of the writer, his posture in writing, his absence from other interference, and many other circumstances which might be suggested, all of which serve to occasion dissimilarity (*Young v. Brown*, 1 *Hagg.*, 556; *Constable v. Steibel*, 1 *Id.*, 56; *Bell v. Norwood*, 7 *La.*, 95; *Murphy v. Hagerman*, 1 *Wright [Ohio]*, 293).

I am of the opinion that, upon the evidence, aside from the opinion of the two expert witnesses in handwriting, I should have no difficulty in reaching the conclusion that the allegations of falsity of the signatures of the decedent and of the witness Canfield have not been satisfactorily sustained, and therefore I am brought to the inquiry whether those opinions are sufficient to overcome the positive testimony of Mr. Stephens, corroborated, as it is, by the memorandum made by him in his diary, and by the testimony of Mr. Dorfner, above referred to.

Considerable experience has taught me that the testimony of experts who are selected by the party in whose behalf their testimony is to be given, and whose testimony in his favor is assured beforehand, is likely to be considerably influenced by the fact that the experts have been employed as such by the party calling them, and that while on the stand they are paid to have a theory, which they are zealous to maintain; and as a general rule they fall short of that impartiality which characterizes ordinary witnesses in court; and this observation has led me to scrutinize, with great care, the testimony given under such circumstances, and for this I have the warrant of one of the most accomplished jurists of this country (1 *Redfield on Wills*, 155; *Winans v. N. Y. & Erie R. R.*, 21 *How. U. S.*, 101).

If the testimony of experts in general is to be so regarded, it seems to me, notwithstanding the argument of the learned counsel for the contestant in this case, that expert testimony as to handwriting, as applied to this case, is especially open to criticism. The opinion of a medical expert may be tested by the standard authorities of medicine; the chemical expert may be required to make his experiment upon which he bases his conclusions before the court; and there is some standard by which to test, not only the capacity of the expert, but the soundness of his opinion. What is there to test the soundness of the expert's opinion in this case, that the handwriting of the body of the will propounded is the same as that of the signatures of Canfield, Hesdra, and Stephens, without the means of testing the theory of those experts, that the signature of Mr. Canfield to the will was simulated by long trial of the writer,

and that that of the decedent was traced over a genuine signature of the decedent? It seems to me that, in such a case, parties are substantially at the mercy of experts, if their testimony and theories are to be recognized as evidence, upon which the positive testimony of the person who made his own signature and saw the others made, is to be overcome; especially where, as in this case, the witness who claims to have seen its execution by the decedent, and the witnessing by Mr. Canfield, both on direct and cross-examination demeaned himself before the court so as to excite no suspicion as to his intelligence, his impartiality, or his integrity, though he knew that the whole contest was predicated upon a very serious criminal imputation upon his conduct; and this last suggestion seems to me, to be substantially conclusive of this case. Mr. Stephens had lived for many years in a community where he had served as a justice of the peace, and been engaged in other occupations, and was well known to a large community; and if there was anything in his character for truth or honesty to excite suspicion or doubt, it would have been known to his neighbors and business acquaintance, and if any just suspicion had existed, the diligence and persistency with which this contest has been waged is an assurance that it would have been discovered and disclosed on the hearing of this case; and it is therefore entirely legitimate to assume that Mr. Stephens is a man of good repute and character among those who knew him. That fact being assumed, it is not reasonable to suppose that such a man entered upon the commission of so great a crime as is imputed to him by this contest, without the slightest motive, so far as the evidence in this case shows.

But for the strangely contradictory statements of the proponent, as to the place where the instrument propounded was found by him, and of his knowledge of its contents, I should have had no hesitancy in admitting this will to probate: but while those contradictions, if they have been correctly recalled and related by the several witnesses who have testified, may well impugn the veracity of the proponent, they do not in any way affect the positive testimony of Mr. Stephens, as to its execution.

The decedent and proponent lived as husband and wife for many years, without any evidence of alienation or discord, and the decedent left no children or parents to whom she owed any duty in the way of testamentary provision, and her husband was naturally entitled to her kindly remembrance in the disposition of her estate; and it is no violent presumption,—considering that the decedent was a business woman, had had charge of a considerable estate, had made and received conveyances, and engaged in some litigation, understood the effect of dying intestate, and that her property, being in real estate, would none of it go to her husband, but would descend to her collateral relatives; and the proponent in his testimony gave, as a reason why he made diligent search for a will, that there was an understanding between decedent and himself upon the subject, corroborating, so far, the testimony of Mr. Stephens when the instructions were received; and he also stated that he was informed, by a person whose name he gave, that she knew that there was a will left by decedent, who could have contradicted him in that respect if the story was untrue. The instrument should be admitted.

Decreed accordingly.

MATTER OF BARRÉ.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
October, 1880.

MATTER OF BARRÉ.

*In the matter of the application of LAURA G. BARRÉ,
an infant, for the appointment of a guardian.*

The mother of a minor, in the absence of a father, has the right to influence and direct the conduct, residence, education, occupation and associates of her child.

Although, by section 2821 of the Code of Civil Procedure, the surrogate's court has authority to appoint a guardian of an infant whose parents are living, such authority should not be exercised except in cases where the parents appear to be unfit for the control of, or to have interests adverse to the infant.

The petitioner, an infant aged nineteen years, had become alienated from, and abandoned the home of her mother, who was willing and able to provide for her, and against whose wish she insisted on associating with a theatrical manager of inferior plays, as an actress. She prayed that one D., at whose house she had interviews with the manager, be appointed guardian of her person and estate. *Held*,

1. That in the absence of evidence to impugn the good character and ability of the parent, or to show that she had forfeited her parental authority, it would be judicial usurpation for the court to intervene between her and her child, and the petition should be dismissed.
2. That this result was not altered by the fact that on the hearing the mother withdrew her objections to the appointment of the proposed guardian, it appearing that the proceeding was an effort to set the mother's authority at defiance.

THIS was an application by an infant for the appointment of a guardian of her person and estate.

The petition set forth that the petitioner was nineteen years old, and entitled to property consisting of her wardrobe, books and plays; that she had no testamentary or special guardian; that it was necessary that some person should be appointed guardian of her per-

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son and estate, and asked that Mary C. Davis, who consented to act in that capacity, be appointed such guardian.

The mother filed objections to the appointment, alleging, among other things, that Mrs. Davis was in no way related to the minor, and was not a suitable person to be appointed such guardian, and that she, the mother, was able and willing to support and care for her daughter.

On those objections, the matter was referred to a referee, to take proof thereof, and the referee reported in substance, that the objections to Mrs. Davis had been withdrawn, and had not been sustained.

The testimony, as returned by the referee, showed that, very nearly two years past, the minor, against the advice, but with the reluctant consent of her mother, had engaged as an actress, under the instruction of, and associated with one McQuade, a so called theatrical manager of inferior plays ; and that the company with which McQuade and the minor were connected, traveled through the country, and that the minor on several occasions communicated with her mother, and asked for means to relieve her wardrobe and luggage from the lien of hotel-keepers' bills, as she had not been paid her wages, and her employer was unable to pay, and that her mother furnished her some means to relieve her embarrassment ; that during the past spring, her mother, with a second husband, commenced housekeeping in this city, and the minor was persuaded to return to her mother's house, where she remained for a time, but as it would seem, receiving occasional visits of McQuade, and studying and rehearsing certain plays ; and that a diffi-

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culty arose between the mother and daughter, by reason of the daughter's determination to enter into a contract with McQuade, for her services as an actress, and which her mother remonstrated against, expressing her distrust and dislike of McQuade, and the impropriety of her daughter's name being associated with his in any further theatrical enterprise.

It also appeared that in Williamsburg, at one time, they had played some engagement, and that after the engagement was concluded, McQuade and the minor remained for a considerable time at a hotel there; against which her mother remonstrated, but without effect.

The mother testified to her ability and willingness to support her daughter and complete her education; but the daughter left her home in this city, and went to the house of Mrs. Davis, where she was in the habit of seeing McQuade frequently, and where her mother was, on one occasion, denied access to her.

Subsequently Mrs. Davis sent for an attorney, who, after consultation with the parties, arranged to take the petitioner from Mrs. Davis' house, without the knowledge of her mother, and she was accordingly taken in a carriage to New Jersey, but soon after returned to Mrs. Davis' house; and this proceeding appeared to have been initiated under the advice of said attorney.

After this, the daughter sent a message, by a servant of Mrs. Davis, to her mother's house, asking that her clothing should be sent to her there, which was not done, and the attorney went to the house and demanded the clothing, which the mother refused to give up, ordering him out of the house, but which was taken to her on the advice of her stepfather.

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It further appeared that the mother called upon Mrs. Davis, and remonstrated with her in the matter, and expressed her unwillingness to have her daughter enter into any engagement, or associate further with McQuade; also, that Mrs. Davis stated that the counsel who had been employed in the proceedings had been engaged by McQuade, who had undertaken to pay them for their services.

After those facts had been proved before the referee, at the request of the mother the objections which had been filed were withdrawn, and thereafter some testimony was given, and three affidavits filed in behalf of the petitioner, tending to show the good character of Mrs. Davis, and her fitness to be guardian of the petitioner.

A. S. CUSHMAN, *for petitioner.*

Mr. FULLERTON, *for objector.*

THE SURROGATE.—It is claimed, in behalf of the minor, that, the objections having been withdrawn, the appointment of Mrs. Davis, as guardian of the minor, should follow as of course; while, on the other hand, it is claimed that it is the duty of the Surrogate to consider the proof, and to determine on that proof what, in his opinion, will best subserve the interests of the minor, consistent with the rights of the mother.

The above facts establish to my mind conclusively, that the conduct of Mrs. Davis, and of her counsel, was an inexcusable and unlawful interference with the legitimate authority of the parent over the custody of her infant child, and that there is no evidence to impugn the good character and pecuniary ability of the parent, nor

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any to show that she has in any manner forfeited her parental authority over the daughter; it seems to me that it would be nothing short of judicial usurpation to intervene between the parent and the child, under the circumstances of this case.

It needs no argument to show that the mother, in the absence of a father, has the right to influence and direct the conduct, residence, education, occupation, and associates of her infant child, and I see nothing in this case, though she has unwisely, doubtless, yielded to the importunities of her daughter, to justify the conclusion that she has surrendered that authority.

The letter by the mother to her counsel, asking him to withdraw from this contest, contains internal evidence that she did not voluntarily withdraw, but that she was constrained to do so by the apparent alienation of her daughter's confidence and affection, and her unwise and inexcusable association with those who were not her real friends; and hence, I cannot escape the conviction that it is my duty to investigate the facts of the case, and only in a clear case to supplant a parent in her authority over her children, and that such apparent surrender on the part of the mother does not relieve this court of its responsibility as the guardian of her true welfare.

I am aware that, by section 2821 of the new Code, authority is vested in this court to appoint a guardian of an infant, whose parents are living; but it is manifest that that authority should never be exercised except in cases where parents appear to be unfit for the control of their infant children, or where they have interests adverse to such minors. .

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It is true that there is no proof in these proceedings to justify any adverse conclusions respecting the good character of Mr. McQuade, but if I am right in the conclusion that the mother's authority over the child is *unquestionable*, her *caprices* in that regard are entitled to respect by the daughter, and her authority as the mother to submission by her.

It is quite apparent from the whole case that the effort to procure the appointment of Mrs. Davis as the guardian of the person and property of the minor is to enable her to contract through her guardian with Mr. McQuade, and set the authority of the mother at defiance.

Petition dismissed.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
November, 1880.

BURNETT v. NOBLE.

In the matter of the estate of MARGARET CURR, deceased.

The testatrix, during her life-time, having a small income, was dependent for assistance, in the management of her business, upon one afterwards her executor, who had charge of her affairs, and collected her interest and dividends, etc., for more than fourteen years prior to her death. He was under no legal or moral obligations to render her gratuitous services, but never asked or received compensation. She often expressed gratitude to him and gave him certain articles of small value. Upon his accounting as executor, he claimed payment for such services.

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Held, 1. That the facts proved an implied contract on the part of decedent, to pay what the services were reasonably worth.

2. That the law implied an employment from year to year, and interest ran from the end of each year.

3. That so much of the claim as was based on services rendered before the commencement of six years prior to the death of testatrix, was barred by the statute of limitations.

4. That testimony of the executor, with reference to transactions and communications with decedent, and what he did, as tending to show an *implied* agreement to pay for his services, was incompetent under Code Civ. Pro., § 829.

The purpose of that section is to prevent the establishment of claims against estates by the testimony of persons interested in the establishment, when the mouth of the alleged obligor is sealed in death.

An executor has no right to waive the defense of the statute of limitations to the claim of another against the estate; and the payment of a claim barred thereby cannot be credited to him on the accounting.

A proceeding in the surrogate's court, to establish an executor's claim against the estate, is analogous to the commencement of an action therefor; and the same defenses, including the statute of limitations, may be interposed, as in an action.

The immunity of the estate from a claim barred by that statute should be more rigidly enforced where the representative holds the claim than in other cases. There being no such thing as the presentation and admission or dispute of a claim made against an estate by its representative, there can be no revival of such a claim when barred.

The testatrix, by her will, directed her executor to erect a suitable monument over the graves of herself and husband, and left the selection of the style of such monument, and the expense thereof, entirely discretionary with him. The executor asked, upon the accounting, to be allowed the sum of \$700 for such purpose. The amount of the personal estate, for distribution, was less than \$2,000. *Held*, that no greater sum than \$350 should be allowed.

MOTION to confirm referee's report on accounting of the executor of the will of decedent.

Exceptions to the report were filed on behalf of the executor and of the contestant, as follows:

The executor filed exceptions, among others, (1) to the disallowance of an item of \$10, for services rendered in removing furniture for decedent in the year 1865. The claim being barred by the statute of limitations,

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before the death of decedent, the auditor found, as matter of law, that the executor could not by his admissions revive it. (2) To the disallowance of so much of his claim against the estate, as was founded upon services rendered prior to December 1, 1871; also to the disallowance of interest upon the several annual amounts allowed by the auditor. In relation to which, the auditor reported that "so much of the claim of the executor as is founded upon services rendered prior to December 21, 1871, is barred by the statute of limitations and should not be allowed. A fair and liberal allowance to the executor, for his services rendered for the six years previous to the testatrix's death, is a proportionate amount of his claim, viz., \$151.20, which amount is allowed." (4) To a number of the rulings of the auditor, in respect to the evidence.

The contestant, Janet Burnett, excepted to the allowance to the executor of any sum on account of services rendered previous to the death of decedent.

The executor asked to be allowed the sum of \$700 for the erection of a monument over the grave of decedent, which amount the contestant considered too large, in view of the size of the estate.

In respect to the monument, the will directed the executor "to finish and have made and placed over the graves of myself and husband, in the Evergreens Cemetery, a suitable monument, of a pattern and kind which he may approve of. And I trust to his discretion in the matter, as he understands my wishes."

As to the claim of the executor against the estate, the auditor reported:

"The contestant objects to the claim of the executor

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for \$350 for balance due him for services rendered from July 18, 1863, to December 21, 1877, a period of fourteen years and five months. It appears from the evidence that during that time Mr. Noble had charge of Mrs. Curr's affairs, held a power of attorney, collected her interest and dividends, sold her stock, and in fact took care of all her interests, and did everything she required; no one else was employed; Mr. Noble and his family were the only ones called upon for assistance. Mrs. Curr appreciated the services rendered by Mr. Noble, and often said she would not know what to do without him; that she was alone in the world, and that she knew she was a great trouble to Mr. Noble, and hoped some day to be able to pay him. It does not appear she ever paid him any money for his services, though from time to time she gave him numerous articles of small value, which had probably belonged to her husband. The total value, however, of these articles, would not exceed \$15. Mr. Noble gives Mrs. Curr credit for these articles, and claims there is a balance due him amounting to \$350.

"The services rendered were valuable and necessary to Mrs. Curr. The services were rendered at Mrs. Curr's request, and were accepted by her. There is no evidence from which I can infer that Mr. Noble agreed to render the services gratuitously, or that he did not expect compensation. He never asked her to *pay* him, but Mr. Noble knew that her income was very small, and that she could not afford to pay him. It was natural for Mr. Noble, under the circumstances, to expect to be paid out of the principal of Mrs. Curr's estate after her death. Mr. Noble was under no legal or moral

obligation to render gratuitous services to Mrs. Curr, which fact she appears to have recognized, and, as before remarked, frequently acknowledged her obligations to Mr. Noble, and expressed a desire and willingness to pay him. I think that from all the facts and circumstances, a contract and promise to pay should be implied. The claim averages about \$25 per year."

The auditor concluded as to the claim, that the hiring of Mr. Noble was from year to year; that the statute of limitations began to run as to each year's services, at the end of the year; and that so much of it as was founded upon services rendered prior to December 21, 1871, was barred by the statute of limitations.

THE SURROGATE.—The first and second exceptions, so far as they raise the question of statutory bar, should be overruled, for the more recent authorities, in this State, at least, hold that the statute of limitations is a complete bar, which the executor has no right to waive; that it is his duty to interpose the statute as a defense; and that the payment of a barred claim cannot be credited to him, on his accounting (*Bloodgood v. Bruen*, 8 *N. Y.*, 362; *Bucklin v. Chapin*, 1 *Lans.*, 443).

In *McLaren v. McMartin* (36 *N. Y.*, 88), it was held, that the mere fact of a partial payment by an executor or administrator, on a demand already barred at the death of the testator or intestate, is not sufficient to revive the demand against his estate.

There seems to be no doubt as to the duty of a representative of an estate to interpose the defense of the statute of limitations against any claim barred thereby; and the next question for consideration is, whether that

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statute can be invoked in behalf of persons interested in the estate, against a claim thus barred, in favor of an executor or administrator.

There seems to be no good reason for a different rule in respect to such a claim. Indeed, it would seem to require the enforcement of the immunity of the estate more rigidly than in the case of an ordinary claim, because in the latter the representative of the estate has no personal interest in neglecting its protection, while in the former, his interest is adverse to any scrutiny of the claim, or defense thereto.

In *Warren v. Paff* (4 *Brad.*, 260), the learned Surrogate held that the statute of limitations might be interposed by the executor, or by any party interested in the fund realized on the sale of real estate by the executor, notwithstanding a decree on final accounting wherein the claims of creditors had been liquidated.

In *Rogers v. Rogers* (3 *Wend.*, 503), it was held that a debt barred by the statute of limitations in the lifetime of the testator, was presumed to have been paid, and was, therefore, not a legal demand or just debt; and that an executor had no right to retain for such a demand, due to him personally, notwithstanding the will provided for the payment of all just debts. There is no such thing as the presentation and admission, approval or dispute of a claim against an estate, made by its representative, and hence there can be no revival of such a barred claim.

In *Re Rogers* (1 *Redf.*, 231), it was held that the statute of limitations ran against an administrator's or executor's claim, the same as any other claim, and as the statute forbids the representative of an estate to retain

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any part of the property of a decedent in satisfaction of his own debt or claim, until it shall have been proved to and allowed by the Surrogate (3 *R. S.*, 96, § 43 [6 ed.]), the proceeding under chapter 460, section 37, *Laws* 1837, to establish the same, or its establishment on the final accounting, would seem to be analogous to the commencement of an action to enforce the same, and no good reason can be suggested why any defense which might be interposed in such an action should be denied in such a proceeding.

This disposes of the first and second exceptions filed by the executor, and brings me to the consideration of the exception, filed by the contestant, to the allowance of \$151.20, to the executor, for services rendered to the testatrix.

I fully concur with the conclusion of the referee, that the facts proved warrant the finding of an implied contract on the part of the decedent to pay for the services rendered by Mr. Noble what they were reasonably worth ; that such promise was not to be performed, or the services paid for, by the will of decedent, and that the trifling articles of gift were not on account of, or in part payment for such services, and that, therefore, the claim for the whole period was not taken out of the statute of limitations ; that the executor is only entitled to payment for so much of the services as became due and payable within six years of the decedent's death ; and that the claim for the other services rendered theretofore, is barred by the statute of limitations ; and, as it appears that the services began in July, immediately after the death of testatrix's husband, that the law implies an employment from year to year (*Davis v. Gorton*, 16 *N.*

Y., 255; *Smith v. Velie*, 60 *Id.*, 110); that the executor is entitled to receive pay for six years and five months, to wit: for the year commencing July, 1871, the wages for which would fall due July, 1872, and could not have been outlawed until 1878, if the decedent had survived to that time.

But an examination of the testimony fails to show any legal basis for the finding of the referee, as to the value of the yearly services rendered. And if I understand his "opinion," he bases his finding upon the assumption that there is proof that the services were worth, for the whole period, the sum charged, and yet the executor was not permitted to give evidence of such aggregate value personally, and the only evidence of value is that it is customary to charge five per cent. on such collections—though the same witness expressed the opinion that under the circumstances of this case, it was worth a larger percentage, without stating the amount. Hence, I am of the opinion, that on the testimony the referee could find that he was entitled to but five per cent. upon the amount collected within the period aforesaid, and interest on the amount, which became due at the end of each year, when it was payable, for it is quite clear that the referee must find the value according to the testimony, and not according to his individual estimate of such value; and unless the executor shall be content with that sum, he may, at his option, take a new reference for the purpose of proving the real value.

As to the fourth exception by the executor, which relates to the rulings of the referee excluding his testimony with reference to transactions and communications with decedent, and what he did, as tending to show an implied

agreement on the part of the decedent to pay for said services, I am of the opinion that it should be overruled, and that the ruling of the referee was substantially conformable to section 829 of the Code.

In *Brague v. Lord* (2 *Abb. N. C.*, 1), it was held that the plaintiff could not give the declarations of a deceased person and a third person, made in the plaintiff's presence, in evidence, when the decedent made a remark which alluded to the plaintiff, and at the same time turned his head toward him; the action being by the plaintiff against the representative of a deceased person, who, it was claimed, had employed the plaintiff as his attorney in certain matters.

In *Freeman v. Lawrence* (43 *N. Y. Super. Ct.*, 288), the action was brought to recover for legal services rendered by the plaintiff to the defendant's testator. The plaintiff was called on his own behalf, and asked if, about the time he was introduced to the decedent, he commenced any action for him; and against the defendant's objection, he answered that he did. This was held error. See, also, *Somerville v. Crook* (9 *Hun*, 664).

Though these authorities do not with distinctness state the particular grounds upon which they were decided, yet it is presumed that the evidence was excluded in the cases, for the reason that whatever was done by the executor or the decedent, from which an obligation to pay could be presumed, was a transaction between him and the decedent, as really as if the parties had entered into a formal contract in writing therefor.

It is true that, on first thought, the question of what services were rendered, after the testimony warranted the inference that such an agreement existed, would

seem not to form any part of the transaction itself as a contract; but upon more careful consideration, it is apparent that such testimony is quite as obnoxious to the prohibition of the statute as would be the testimony of the claimant to the particular terms of an express agreement, for it is the performance of the services for the decedent, with her knowledge, that constitutes the agreement, which the law implies. And if the decedent were alive she might be able to show an agreement that such services were gratuitous or on account of an indebtedness, or that by reason of some special circumstances existing between the parties, they were less valuable, or that they had been paid for.

If I understand the purpose of the statute under consideration, it is to prevent the establishment of claims against estates by the testimony of those interested in such establishment, while the mouth of the alleged obligor is sealed in death and cannot controvert the claim, or the facts upon which it is sought to be established.

The same considerations justify the rejection of the claimant's testimony as to the value of his services.

The executor's account states an amount to be paid for a monument, pursuant to the directions of the will,—\$700. If I understand the position of the executor, it is that that sum should be retained for that purpose, and that the court should so order, and that it has no power to interfere with his apparent discretion conferred by the will.

In the case of Emma J. Luckey (4 *Redf.*, 95), I had occasion to consider a kindred question, and therein reached the conclusion that such a discretion must be exercised within the limits of the law, and that the law

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did not permit an unlimited or capricious exercise of discretion.

Ordinarily, the representative of an estate makes the expenditure on his official responsibility, and submits the result to the Surrogate on final accounting. But as no such expenditure has yet been made, nor any liability incurred, it is proper to consider at this time what would be a reasonable sum to be retained by the executor for the purpose named. Considering the small amount of the estate—it being less than \$2,000—(for distribution), out of which must come the expenses of this accounting, commissions, and a reasonable sum for the monument, I am of the opinion that no greater sum than \$250 should be allowed therefor, and that a larger sum would be an abuse of such discretion.

Referee's report modified accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
November, 1880.

MATTER OF TAINTOR

*In the matter of the estate of EDWARD COE TAINTOR,
deceased.*

The will of a citizen of the United States, residing in China, admitted to probate by the court of the United States consulate-general, at Shanghai, may be presumed to have been executed according to the laws of China; and on the production, to a surrogate's court here, of an exemplified copy of the record thereof, under the seal of such consulate, letters could be issued thereon, under 2 R. S., 67, § 68 (revised in Code Civ. Pro., § 2695).

MATTER OF TAINTOR.

APPLICATION for letters testamentary upon the will of a citizen resident in China, proved before a United States consul there.

PETER STARR, *for executor.*

THE SURROGATE.—By 3 *R. S.*, 71, § 93 (6 ed.), it is provided that a will, duly executed by a person residing out of this State, according to the laws of the State or country in which the same was made, which shall have been duly admitted to probate in said State or country, upon the production of a duly exemplified or authenticated copy of such will, under the seal of the court in which the same shall have been proved, will authorize the Surrogate having jurisdiction to issue letters testamentary or of administration with the will annexed.

By section 4083 of the Revised Statutes of the United States, the minister and consuls duly appointed to reside in China are invested with the general authority therein described, and which appertain to the office of minister and consul. By section 4085, such officers are also invested with all the judicial authority necessary to execute the provisions of the treaties with China. By section 4086, jurisdiction in civil matters is to be exercised in all cases and enforced in conformity with the laws of the United States, which are extended over all citizens of the United States in China, and others, under the terms of the treaty; but where such laws are not adapted to the object, or are deficient in provisions necessary to furnish suitable remedies, the common law, and equity, are extended over said citizens in said China, and if neither the common law or law of equity, or

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statutes of the United States, shall furnish appropriate and sufficient remedy, the minister shall, by decrees or regulations, which shall have the force of law, supply such defects and deficiencies.

Mr. Burlinghame, minister to China, on April 23d, 1864, among other regulations for the consulate courts of the United States, in China, under the head of "ordinary civil proceedings," and that of "bankruptcy, partnership, probate, etc.," did, by decree or regulation numbered 10, provide, that until the promulgation of other regulations, the consuls should continue to exercise their former lawful jurisdiction and authority, in probate of wills and administration of estates, etc., not specially provided for in previous decrees, according to such reasonable rules, not repugnant to the constitution, treaties, and laws of the United States, as they might find necessary or convenient to adopt.

By those statutes, it is apparent that the court of the United States consulate-general, at Shanghai, had authority and jurisdiction to take the probate of the will of a citizen of the United States, there residing, and the instrument thus proved, and evinced by an exemplified copy offered for the purpose of obtaining letters testamentary in this matter, may be presumed to have been duly proved to have been executed according to the laws of China, under the authority of said court; and as said court appears, by the terms of said statutes, to be one of general jurisdiction in respect to the matters covered by the treaties, I am of the opinion that full faith and credit should be given to the exemplified record, under the seal of said consulate, and that under our statute, letters testamentary thereon may issue.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
December, 1880.

CRAGG v. RIGGS.

*In the matter of the accounting of GEORGE W. RIGGS
and JOSEPH K. RIGGS, executors of, and trustees
under, the will of ELISHA RIGGS, deceased.*

When a corporate dividend reaches the hands of a trustee holding stock, the determination of the rights of the respective beneficiaries rests with him, unaffected by any action of the corporation in declaring the dividend, and the rights of the beneficiaries then attach.

The rational and equitable rule by which to determine the relative rights of the life tenant and remainder-man, in respect to stock dividends in corporations, in whose stock the fund is invested, is to inquire how much of the stock dividend was capital, or made to represent an increase in the value of the property, and how much came from income or earnings, and also how much of the stock dividend was made up of accumulations before, and how much from earnings after the investment.

The testator, by his will, gave his residuary estate to his five sons and one daughter, in equal shares; the daughter's share, however, being vested in his executors, in trust, to invest the same, and pay to her, during her life, "the net interest, dividends, or other periodical income thereof," the principal, upon her death without issue, going to her surviving brothers. The daughter having died without issue, the executors, at the instance of her administrator, filed their accounts, wherein they credited certain stock dividends made by various railroad corporations, whose stock they held, to capital account, whereby these accrued solely to the benefit of the remainder-men. *Held*, that, there being no suggestion that the stock dividends represented anything but income or profits of the corporations, the accounts must be corrected by crediting the dividends to income account, and discharging them from the capital account, and the proper proportion be paid to the administrator of the tenant for life.

The authorities, with reference to the relative rights of life tenant and remainder-man in such a case, collated and discussed.

THIS was a motion to confirm the report of a referee, to whom, upon objections being filed to the accounts of George W. Riggs and Joseph K. Riggs, executors of

and trustees under the will of decedent, they were referred, to examine; opposed by them and also by Samuel W. Cragg, administrator of the estate of Mary A. Cragg, formerly Mary A. Riggs, decedent's deceased daughter.

The decedent, by his will, after making certain specific bequests, gave the rest, residue and remainder of his estate to his five sons and daughter, "and such other child or children, if any, as may be hereafter born to me, and to their respective heirs, executors, administrators and assigns, in equal portions, or share and share alike, except the share or portion of my said daughter Mary Alice Riggs, which I dispose of for her sole and separate use and benefit, whether married or unmarried, as follows: that is to say, I hereby give, devise and bequeath the same to my executors hereinafter named, in trust, for her separate use and benefit during her natural life, to invest and improve the same at their best discretion, and to pay to her, from and after her arrival at the age of twenty-one years, or marriage with the consent of her mother, if living, whichever event may first happen, into her own hands, whether married or unmarried, and upon her own separate receipt, to be given from time to time, and not by way of anticipation, under her own hand, which alone shall be a competent discharge therefor, the *net interest, dividends or other periodical income thereof*, and at her decease, I hereby give, devise and bequeath the capital of her said share or portion to her issue, or other descendants, in equal portions, or share and share alike."

If his said daughter should not marry, or marry, and have no issue that should survive her, then upon her de-

cease, her share or portion in the residuary estate was devised and bequeathed to her surviving brothers, and their issue, etc.

Decedent died August 3, 1853, leaving him surviving the said six children, two of whom were the accounting executors and trustees, and two of whom, viz.: William H., and the daughter Mary A., were then minors.

Mary A. married Samuel W. Cragg, afterwards the administrator of her estate, and died intestate March 9, 1870, leaving no children.

The executors, on the petition of her administrator, filed one account, as such, from August 3, 1853, to May, 1871; and, as testamentary trustees, they filed two accounts, one from August 3, 1853, to June 29, 1860, when said Mary A. became twenty-one years of age, and another for the period between June 29, 1860, and March 9, 1870, the date of her decease. As the share or portion of Mary A. in the residuary estate, given at her death, under the then existing circumstances, to her surviving brothers, did not include the "net interest, dividends, or other periodical income thereof," the questions that arose herein were whether certain items in the accounts were, as between said life tenant and the remainder-men, to be treated as income or principal. The facts were not disputed, but numerous exceptions were filed to the referee's rulings, by the executors and trustees, and also by the contesting administrator. Among these, the first exception by the executors was to the allowance of the contestant's objections to certain items, amounting to \$16,446.34, and relating to stock dividends by various railroad corporations in which they held stock; which were by them credited to capital account, and which the

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referee held should have been credited to income account, and its proper proportion paid to the life tenant, Mary Alice Riggs, or her administrator; it being understood that said dividends represented the income or profits of said corporations. The portion of the opinion delivered upon this exception is here given.

AUSTIN G. FOX and WALDO HUTCHINS, *for the executors and trustees.*

WM. M. PRICHARD and ALGERNON S. SULLIVAN, *for contestant.*

THE SURROGATE.—It is apparent that the decedent intended “the net interest, dividends, or other periodical income” of one-sixth of his residuary estate, for the support of his said daughter, the other children receiving their shares absolutely, the capital of said one-sixth being disposed of after her decease. *Perry on Trusts*, § 545 (2 ed.), states the issue raised by this exception, substantially as follows: that the early English rule, that all stock dividends, so called, together with extra cash dividends or bonuses, belong to the remainder-man, has been so changed that dividends in money, which come from the earnings of capital invested, belong to the tenant for life; but that the question arises, where a corporation has capitalized a part of its earnings by using them to enlarge its property or to improve its value, and the corporation votes to issue and apportion among their stockholders new certificates of stock, which, in whole or in part, represent the amount of earnings capitalized, and on this latter state of facts, the issue is whether such stock dividends belong to the life tenant or remainder-man. And Mr. Perry, in a note at page 78 of vol. 1, says that, from the character of the de-

cisions in the various States, and from the great number of States in which no decision has yet been had, it may be considered an open question, at least in a great majority of the States.

In *Hooper v. Rossiter* (1 *McClell.*, 536), cited by Perry, it was held that wherever the addition was made clearly and distinctly, as dividend only, the tenant for life was to have it; but when not given as a dividend, it was considered an accretion of capital, without regard to the expression of the testator, dividends, dividends and profits, dividends, interest and profits, or interest, dividends, profits and proceeds.

In *Re Barton's Trust* (*L. R. 5 Eq. Cas.*, 238), it was held that where shares were settled upon trust, to pay A., for life, "the interest, dividends, share of profits, or annual proceeds," and where, during A.'s life-time, an addition of three new, fully paid-up shares to those already held in trust for her (A.) was made, pursuant to a resolution of the company to apply a portion of "the net earnings during the half year" to necessary works, a dividend being declared out of the remaining portion of the earnings, these new shares, representing the money so applied, were capital, and not income, as between the life tenant and remainder-man. The vice-chancellor held that the company was not bound to divide the profits, and that it was competent for them to set apart, for contingencies, so much as they thought fit, and that the dividend, to which the tenant for life was entitled, was the dividend which the company chose to declare, and, when they elected to carry a part of the earnings to capital account and turned it into capital, they had the authority to do it, and the tenant for life could not complain. He based

the decision upon *Paris v. Paris* (10 *Ves.*, 188), where Lord ELDON said, that the bank had the power to give the bonus to the tenant for life or not.

In *Minot v. Paine* (99 *Mass.*, 101), the same doctrine was laid down. See, also, *Balch v. Hallett* (10 *Gray*, 403). These cases substantially hold that when the apportionment of shares, or stock dividend, creates new capital, thereby enlarging and increasing the value of the property, whether it comes from earnings or other sources, it belongs to the remainder-man, while dividends, paid in cash or otherwise, not in addition to, or diminution of the capital, go to the tenant for life.

In *Daland v. Williams* (101 *Mass.*, 571), it was held that though the dividend was declared in stock or cash at the option of the stockholder, yet, if he, being a trustee, elected to take the stock, and it was for the interest of the estate that he should, and all the parties so agreed, it belonged to the remainder-man.

In contravention of this doctrine of the English and Massachusetts authorities, it is claimed that nothing but profits can be divided, and that all dividends declared, whether in stock or cash, being the produce, proceeds or result of the property, belong to the tenant for life.

In *Earp's Appeal* (28 *Penn.*, 368), it was held that all accumulations in stock, after the death of a testator, were a part of the income, and as such belonged to the tenant for life, and that no act of the corporation could give them to the remainder-man; that the value of the stock, held by the testator at his death, was the capital of the trust, and all income of such capital, whether in the form of other certificates or not, must be regarded as income.

In *Wiltbank's Appeal* (64 *Penn.*, 256), a corporation

increased its shares, giving the right to subscribe therefor to the old shareholders at par. A trustee took the shares to which the estate was entitled, paid for them with his own money, and sold them for an advance which he carried to the credit of the capital. It was held that such advance was a premium upon the stock and a product of it, and belonged to the tenant for life.

In *Leland v. Hayden* (102 *Mass.*, 550), a stock dividend was made, which was bought in by the corporation with its earnings, which dividend did not represent an increase of the capital, and the court decreed it to be income and to belong to the life tenant.

In *Van Doren v. Olden* (19 *N. J. Eq.*, 176), the chancellor sent the case to a master to inquire and report how much of the stock dividend was capital, and how much income; and also how much of the stock dividend was made up of accumulations before the investment of the trust fund in the stock of the corporation, and how much of it came from the earnings after the investment. .

Upon this conflict of authority, and the contrariety of reasons given by the respective courts for the conclusions reached, it becomes necessary to consider the views of our own courts upon the subject, and to deduce from all some rational and definite principle upon which this vexed question may be determined, consistently with the rights of life tenants, and of remainder-men. It is the occasion of surprise that so little has been said by our courts upon the subject.

In *Clarkson v. Clarkson* (18 *Barb.*, 646), the testator gave the residuum of his estate to his five children, three-fifths to his sons absolutely, and two-fifths to his two daughters, in trust, to pay "the interest, dividends,

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and proceeds" to said daughters for life, with remainder over. The trustees invested \$12,600 in the capital stock of the Utica & Schenectady Railroad Company, in one hundred shares, and afterwards invested \$6,000, in sixty shares, in the stock of the Mohawk Valley Railroad Company. The first-named company paid an annual dividend of ten per cent. upon the par value of the stock, which was paid to the trustees, and afterwards it paid an extra dividend of sixty per cent. on the capital stock at par, amounting to \$6,000, after which a consolidation of said companies with others took place under an act of the legislature, whereby the New York Central Railroad Company was formed, and the trustees became entitled to, and received, an equal number of shares to those held in the two companies, being two hundred and twenty shares of \$100 each, and also bonds or certificates of the new road for the sum of \$55 on each of the two hundred and twenty shares held in the former companies, amounting to \$12,100. The new company's stock was worth \$115 per share, and the bonds ninety per cent.

It was held, that it was the intention of the testator that all the gains, profits, income and proceeds of the two shares of his estate should go to his daughters, as tenants for life, and that the sixty per cent. stock dividend belonged to them, and the trustees were directed to deliver the same or its substitute, and all income, dividend, or increase received thereon, or pay the value thereof; that with respect to the bonds or certificates of the new road the case was different; that these, not being paid to the trustees, either as interest, dividends or proceeds, but as the difference between the value of the stock of the old and new corporations, were to be re-

garded as capital, as though no consolidation transfer had taken place, except that the bonds received for the sixty shares would follow their principal, and go to the *cestui que trust*; that, upon the coming in of the report of a referee, to ascertain the value of the remaining one hundred and sixty shares, should the value of such stock and bonds and certificates be equal to the capital invested, or if deficient, upon the tenants for life making up such deficiency, a decree might be entered, directing the trustees to deliver over to them the sixty shares of stock dividend, together with the bonds, certificates, and all dividends thereon, received by the trustees.

The facts of this case sharply present the question under discussion; but it is a singular fact that the learned judge who delivered the opinion confined his discussion to the question, whether the life tenant was entitled to extraordinary cash dividends, which the later authorities in England award to the life tenant. There seems to be no discussion or review of the numerous conflicting authorities, as to who is entitled to stock dividends. But, at page 657, the learned judge says: "the stock payment of sixty per cent., made upon this investment, was properly dividends, extraordinary in amounts, not in manner of payment, that being a matter of policy in the company. 'Dividends,' as used in the will, is unqualified; it includes all distributions to corporators, of the profits of the corporation, large or small, made at long or short intervals, and without any regard to the manner or place of their declaration, or mode of payment;" and he adds that the terms of the will clearly showed that the testator intended that all the gains, profits, income and proceeds of the two shares of his

estate, of whatsoever kind, name, or nature, should go to his daughters as tenants for life, and that intention should not be defeated. The authority of this decision cannot be denied, though, in the conclusion reached, the court principally considered a question not involved.

In *Re Woodruff's Estate* (1 *Tucker*, 58), the same question was so decided, upon the authority of *Clarkson v. Clarkson*, above cited.

It appears, therefore, by the authorities in New York and New Jersey, that the real inquiry is, how much of the stock dividend was capital, or made to represent an increase in the value of the property, and how much came from income or earnings, and also, how much of the stock dividend was made up of accumulations before, and how much from earnings after, the investment. And this, it seems to me, is the rational and equitable rule, by which to determine the question as to the relative rights of the life tenant and remainderman.

This rule does not invade the prerogative of the corporation, to withhold the declaration of a dividend, as shall seem to them best, free from any interference on the part of the stockholders, except by the exercise of their influence to procure the *declaration* of a dividend. At the same time, it denies the right of the corporation to discriminate against the life tenant, in favor of the remainderman, by changing the name or form of dividend, when made out of income, proceeds or profits of its business.

From the best consideration I have been able to give this question, I am of the opinion that when a dividend

reaches the hands of a trustee, the determination of the rights of the respective beneficiaries rests with him, unaffected by any action of the corporation in declaring the dividend, and that the rights of such beneficiaries then attach; that the trustee, in the adjustment of those rights, should look to the real question, whether the dividends represent income or profits, or capital, without regard to the form of the dividend, or the name by which it is declared. Otherwise the *ipse dixit* of the corporation would be substituted for the judgment of a court, which alone has competent jurisdiction.

This rule seems to me to obviate what seems an absurdity in the Pennsylvania decisions,—that the life tenant is entitled to any increase of the value of stock which may have resulted from other causes than the use of the income or profits, and which would seem to imply a liability on the part of the life tenant to keep the value of the capital good, though diminished by other causes than the distribution of it, as a stock dividend. And it avoids, it seems to me, an equally absurd view, taken by the Massachusetts authorities, especially in *Minot v. Paine*, above cited, that cash dividends, however large, must be regarded as income, and stock dividends, however made, as capital; for that rule would enable the corporation to absorb the entire income, not in necessary repairs and improvements, and enlargement of the facilities of business, but by increasing its stock and dividing such profits, under that name, by which a life tenant would be turned over to the income or profits of the income or profits, instead of the real income and profits themselves,—which may be reasonably assumed to have been the intent of the testa-

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tor—or, worse still, entirely deprived of income by the continual capitalization of the income. For if such capitalization continue until the dissolution of the corporation, the remainder-man, upon that theory, would receive the entire income and capital, by the assumption of judicial functions by the corporation.

As there is no suggestion in this case that the stock dividends, referred to in the exception under consideration, represented anything but income or profits, the conclusion reached by the referee, that they should be credited to the income, should be sustained, and the exception overruled.

But it is my duty to say, that if there were anything in this case to warrant the conclusion that any of the dividends so declared, whether in cash or stock, included income earned before the death of the testator, and before the rights of the life-tenant attached, I should deem it my duty to send the matter to a referee, to take an account in respect thereto.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
January, 1881.

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*In the matter of the probate of a paper propounded as
the last will and testament of MARY ELIZABETH HAT-
FIELD, deceased.*

The decedent, who was an unmarried woman, owning real estate of considerable value, died in November, 1879, aged about fifty-two years, in

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the house of her cousin, with whom she had resided since the death of her mother in 1862, having previously resided with the latter. She was a member of a church; attended church and Sunday school regularly; took care of her room and person; could do some light housework and needlework; but was not in vigorous health; was afflicted with stuttering; uttered only short sentences; never learned to read or write, though she had attended school for three years; could not count more than ten, or tell the time of day from the clock, or add or multiply; had no idea of the value of property, or of money beyond ten cents; was easily lost in familiar streets; had no understanding of the amount of her property; had two sisters, one of whom was in an insane asylum; was herself adjudged an idiot in 1871; and otherwise evinced a weak mind, being unable to attend to most things which persons of ordinary intelligence can do. Her alleged will, signed by a cross, bore date in 1869, and left all to a member of the family in which she lived, the daughter of her cousin, who was present when she visited a lawyer's office, where the will was drawn, and also at the time of the alleged execution, the devisee's brother writing decedent's name around the cross. *Held*, that decedent was not of sound and disposing mind, at the time when the will purported to have been executed, and that the instrument should be refused probate.

While the law does not undertake to test a person's intelligence, and define the exact quality of mind and memory which he must possess to authorize him to make a will, it does require him to have a mind to know the extent and value of his property, the number and names of those who are the natural objects of his bounty, their deserts in reference to their conduct towards him, their capacity and necessities; that he shall have sufficient active memory, to retain these facts in his mind long enough to have his will prepared and executed; and if this amount of mental capacity is somewhat obscure or clouded, still the will may be sustained.

The use of the term *compos mentis*, as a standard of testamentary capacity, is liable in certain cases to mislead,—not all who come within that description being competent to make a will.

An adjudication of the idiocy of an alleged testator, made two years after the date of the alleged execution of the will, while neither conclusive nor binding on the surrogate's court, upon an application for probate, is to be distinguished from an adjudication of lunacy in a like case, which would, *it seems*, be less significant.

The policy of the statute (2 R. S., 60, § 21), limiting the age under which a person cannot be a testator,—explained.

APPLICATION for the probate of a will.

Objections were filed on behalf of Emeline Townsend, a sister of decedent, on the ground that it was not the

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last will of decedent ; that the contents were never known to her ; that she never declared it to be her last will ; that she never requested the witnesses to subscribe ; that she was not of sound mind ; that it was procured by fraud, circumvention, misrepresentation and undue influence by John W. Bogart or Ellen Bogart ; and that it was not freely or voluntarily executed.

The instrument propounded bore date December 1, 1869 ; purported to have been executed by a cross, and was witnessed by Dr. John W. Warner and Francis Bennett. After providing for the payment of debts, it gave and devised all decedent's estate, real and personal, and all her chattels and property of every kind and description, to her cousin Ellen Bogart, daughter of Anderson Bogart of the city of New York, her heirs and assigns forever, and appointed John W. Bogart sole executor.

It appeared that decedent, who was an unmarried woman, died in November, 1879, aged about fifty-two years, in the house of Anderson Bogart, her cousin, in New York city, where she had resided since 1862 ; she was not of vigorous health, was afflicted with stammering, and had a sister in an insane asylum, and another sister in Milwaukee. She owned real estate of considerable value in New York city, and was a member of the Methodist Episcopal church in Twenty-seventh street.

Dr. John W. Warner testified, for proponent, that he was a physician residing in New York city ; that he knew decedent in her life-time ; that his signature was attached to the paper propounded, which was executed at its date, at Mr. Bogart's house ; he was requested to go to the house as a witness, by Mr. Bogart, where he saw de-

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cedent, Mr. Francis Bennett and Mr. Bogart ; he thought decedent informed him she was about to execute her will, and after she signed it he witnessed it, in the presence of the other witness and decedent, at her request ; he was familiar with the requirements of such execution, and if anything had been irregular, he would have noticed it ; she executed it freely, and he had no doubt she was of sound mind.

On cross examination, he testified that when he arrived at the house, decedent was sitting at the table, in the back parlor, and he was introduced to her by Mr. Bogart ; the paper propounded was lying on a stand or table, where decedent was ; decedent's name was written before she made her mark, but he could not tell by whom, and it was his impression that decedent said it was her last will and testament. She said : " Gentlemen, I desire you to witness my last will and testament," or something to that effect ; he shouldn't have thought that she was otherwise than of sound mind from her appearance ; he didn't think a physician could form a competent judgment as to the lunacy of a person, by means of such an interview.

On re-direct examination, he testified that he would need facts, upon which to base his opinion that she was of unsound mind ; that he saw nothing abnormal in her condition, and believed her sound at the time.

Francis Bennett testified for proponent that he was a subscribing witness to decedent's will ; he knew decedent and the last witness, and was asked by one of the family to come down into the parlor in the evening, to witness the instrument ; he found Dr. Warner, decedent and Mr. Bogart present with decedent, and the in-

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strument lying on the table ; decedent asked him to witness it, saying that it was her last will and testament ; he saw her sign it,—make her mark ; that he signed it a few minutes after the other witness, both in the presence of decedent ; he had lived in the family two or three years, and in his opinion her mind was sound ; he couldn't say who wrote decedent's name to the instrument ; there was nothing peculiar in her actions ; she requested the other witness to subscribe at the same time ; she was not under restraint ; he had known her two or three years, meeting her every day at meals.

On cross-examination, he testified that he did not recollect the words used at the execution, and did not know what became of the paper afterwards ; that he never had any protracted conversation with decedent, but they talked about different matters at the table ; elsewhere he may have said good-morning, good-evening ; he recollected conversations with her as to ordinary subjects of life ; he could recall no conversation at the table ; decedent sat near Miss Bogart and addressed her remarks to her ; he judged decedent could not write, from her making her mark ; he had seen her in Lexington avenue alone ; that she carried a card with her, addressed, so that, in case she was lost, she could be identified ; decedent talked with other persons at the table, and was a reasonable person, and he was satisfied that all things were done as stated in the attestation clause.

John W. Bogart testified for proponent, that he knew decedent ; he saw decedent's will at Lexington avenue at the time of its execution, and he wrote decedent's name at her request, and asked her whether it

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was her last will ; she said yes ; he then wrote her name around the cross.

On cross-examination, he testified that Mr. Bogart, and witness's sisters, Ellen and Clara, were present ; that he had repeatedly heard decedent say she intended to leave all her property to witness's sister, Ellen ; she said she had left it all ; that she said that to him, repeatedly.

The further facts sufficiently appear in the opinion.

TOWNSEND WANDELL and JACOB F. MILLER, *for proponent.*

ANDERSON & MAN, *for contestants.*

THE SURROGATE.—The testimony, upon which it is claimed that the decedent was of sound and disposing mind, is substantially that of Dr. Warner, one of the subscribing witnesses to the will propounded, who testified that he had no doubt decedent was of sound mind ; that from her appearance he thought she was of sound mind, though he did not think a physician could form a competent judgment by means of such an interview ; but he observed nothing abnormal in her condition :—that of the other subscribing witness, Mr. Bennett, who testified that he had lived in the family two or three years ; that he thought decedent's mind was sound, and that there was nothing peculiar in her actions ; he could not recollect what was said by her at the execution, and never had any particular conversation with decedent, except casually at the table, and that he had seen her in the street alone, though she carried a card, with her address, to avoid being lost ; that he thought her a reasonable person :—that of Mr. Anderson Bogart, father of the sole devisee, that he went with decedent to Mr. Whitbeck's

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office ; that she said she wanted to give all her property to witness's daughter Ellen, who was present when the will was prepared :—that of Mary Bogart, another daughter, who heard decedent say that she had made a will, and left her property to Ellen ; that decedent spoke of her will, and of family concerns, though witness had not seen her within six years of her death :—that of John W. Bogart, brother of the devisee, that decedent declared the instrument to be her last will, when he was present at its execution, and that she repeatedly said that she intended to leave all her property to Ellen, and after the will said she had :—that of Mrs. Rhoades, that she saw decedent at church, and that she would talk of flowers, and about the church, and that she intended to give all she had to Ellen, because she was good to her ; that her conduct was rational ; that she talked right, though not much ; that she was sensible, and would tell how she liked a new preacher, say that she loved the Saviour and God's people, and gave that as a reason for going to church ; that she couldn't recall any sentence that she ever uttered at length ; that she spoke of her sister, Mrs. Townsend, who resided in Milwaukee, saying that she did not treat her well, and that she did not want her money to go to her, because she had neglected her :—that of Charles W. Bogart, another brother of the devisee, that he talked with her in ordinary conversation ; that she spoke of her sister, Mrs. Townsend, thought she had treated her badly, that she had borrowed money of her, and never paid principal or interest ; spoke of her property in connection with Mr. Cook, who had charge of it ; that she would do certain kinds of housework, sewing, and keeping her room in order ;

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could tell a good penny from a bad one ; spoke to him of her house in Seventh street, saying that Ellen should have it, and her sister in Milwaukee should not, because she had borrowed money of her and not repaid it ; that she went to the Seventh street house alone frequently, and to church and Sunday-school ; she would speak of the text and church affairs ; he thought her rational ; she would give the substance of the text and sermon ; he had seen her try to write :—that of Mrs. Marsh, that she had been to the store to get things, and would come back with them ; she would get what she was told to ; she was intelligent and sensible, answering questions as well as other persons :—that of Clara P. Bogart, sister of the devisee, who testified that she would converse upon ordinary topics respecting the church and Sunday-school, and about what the preacher said ; kept her clothes in order ; did certain housework ; had been to Stewart's alone ; purchased shoes and candies, and said she would leave her property to Ellen ; called her sister hard names because she had not treated her kindly ; that her conversation seemed rational ; she knew five-cent from ten-cent pieces, but that was the extent, and bad pieces from good ones ; she had no schooling and could not count or read, but could copy the alphabet on a slate :—that of Mrs. Leidy, that she had had several conversations with decedent, and met her at the door when she called, and asked if Clara was at home ; if not, she would say so ; had seen her do various matters of housework ; she had taken notes for Miss Bogart to different places, and that her conversation was rational ; that there was a marked difference between her and Miss Bogart ; she talked rationally. To about the same effect

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is the testimony of Ellen Bogart, the devisee, together with the testimony of Mr. Anderson Bogart, her father, who attempts to explain away the force of his affidavit made in the idiocy inquiry, on the ground that he did not understand the object of the proceedings ; but he testifies that the statements of fact, made in the affidavit, he knew to be true at the time.

The testimony militating against decedent's mental capacity is, in substance, that of Mr. Searles, that decedent could not carry on connected conversation, and could not read ; when twenty or twenty-three years old, she would give him trifling presents of no value, a small amount of worthless pictures ; that her conversation was not intelligent, and she seemed to grow worse, rather than better, and after her mother's death was not able to go about, but would call persons by their names in the house :—that of Mrs. Holmes, that she would speak like a child ; could not tell the time of day by the clock, and would give persons pictures cut out of magazines, old pieces of calico and silk ; used to state, as her reason for not riding in cars, that she could not tell where to go when she left them ; that in his opinion her acts and conversation were not rational ; she manifested an unpleasant feeling towards Mrs. Townsend, her sister, on account of her having borrowed money and not paying ; and that he heard her speak of her sister who was in the insane asylum :—that of Thomas Boese, who was one of the commissioners on the inquiry on which she was declared an idiot, that she was questioned before the jury, and did not seem to understand the questions or make intelligent answers :—that of Mr. Man, the counsel who conducted those proceedings, that he

visited decedent for the purpose of ascertaining her mental condition, as a justification of the proceedings; in conversing with her, she did not seem to understand what was said to her, or make intelligent answers when questions were put to her; seemed dazed and looked at Mr. Bogart; that he had two interviews before the proceedings:—that of Mr. Cook, who was appointed committee, that she did not know her letters and could not conduct any conversation connectedly; did not seem to be capable of giving a rational answer; her conversation and conduct were irrational; that Mrs. Townsend, her sister, borrowed of decedent's mother \$2,000, and gave a note which she did not pay:—the deposition of Mrs. Townsend, taken on commission, that decedent was easily influenced and controlled; that her acts and conversation were irrational; she could not learn her letters, or reckon the multiplication table, or count numbers; that she attended school three years; she met with an accident by falling against a stove hearth, striking her forehead, from which she was sick, and the doctor said her skull was indented, and pressed on the brain; that decedent became simple after that:—the deposition of Charles W. Brown, a nephew of decedent, and son of Mrs. Townsend by a former husband, taken on commission, who testified that decedent could not carry on conversation, did not understand the meaning of ordinary English words, could not read or write, and did not know a letter or the multiplication table; could not count the fingers on her hand, or tell the value of money, or recall any event in her life, except something marked, like the death of her mother; was irrational in her acts and conversation; that he tried to see if she

could tell the difference between twenty-five-cent pieces and fifty-cent pieces, and she failed :—together with the proceedings in 1871, in which she was duly declared, by the supreme court, on such inquiry, an idiot, and a committee appointed, the proceedings being initiated by Mrs. Townsend, but based principally upon the affidavit of Anderson Bogart, the father of the devisee, that she was of weak mind, could not read or write, or count ten or a less number, or tell the time by clock or watch, or go about the streets alone, unless several times pointed out to her ; was easily lost, and had to take a card with her, showing her address ; could not reckon money or tell the value of anything.

The affidavit of Mr. Cook was substantially to the same effect ; and it appears that, upon the testimony of these witnesses, together with the examination of the decedent herself, she was regularly adjudged an idiot, and a committee appointed, although Mr. Bogart and his daughter seek to break the force of the testimony set forth in their affidavits, by claiming that they did not understand the nature of the proceedings, yet were not willing to testify that the statements made by them were untrue.

In the case of *Mairs v. Freeman* (3 *Redf.*, 181), I had occasion to examine with care the extent of mental capacity required for the execution of a will, and the numerous authorities bearing upon that subject ; and the general doctrine laid down by *Swinburne*, 127, 8, approved by *Shelford on Lunacy* (1st ed.), 37, that a man of mean understanding, yea, though he incline to the foolish sort, is not prohibited to make a testament ; and that of *Stewart's Ex'r v. Lispenard*, 26 *Wend.*, 301, that a person being of weak understanding, so he be neither an idiot

or lunatic, is no objection in law to his disposing of his estate. Courts will not measure the extent of a person's understanding or capacity. If a man therefore be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his action, where not revoked ; but the term *compos mentis*, for the purpose of enabling a person to execute a will, is carefully considered and well stated in *Delafield v. Parish* (25 *N. Y.*, 9); *Van Guysling v. Van Kuren* (35 *Id.*, 70); *Tyler v. Gardiner* (35 *Id.*, 559); *Kinne v. Johnson* (60 *Barb.*, 69); *Bundy v. McKnight* (48 *Ind.*, 502); *Meeker v. Meeker* (75 *Ill.*, 260).

In the last case, it was held that the incapacity preventing the making of a valid will, must be such as prevents a person from understanding the effect and consequence of his acts, from reasoning correctly, and understanding the relation of cause and effect in ordinary business affairs ; but mere weakness of mind does not incapacitate.

In *Bundy v. McKnight*, above cited, the doctrine is to my mind best expressed, that the law does not undertake to test a person's intelligence, and define the exact quality of mind, and memory which a testator must possess, to authorize him to make a will, yet it does require him to possess a mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty ; their deserts, in reference to their conduct and treatment towards him ; their capacity and necessities ; that he shall have sufficient active memory to retain all those facts in his mind, long enough to have his will prepared and executed ; and if this amount of mental capacity is somewhat obscure, or clouded, still

the will may be sustained. The use of the term *compos mentis*, which some of the courts make the standard of testamentary capacity, and as meaning "sound mind," is liable in my opinion to mislead in such a case as this, for a child ten years old of ordinary intelligence could not be said to be *non compos mentis*, and yet no one would pretend that such a mind could grasp the facts which are made the test of testamentary capacity by the authorities above cited; and the fact that our statute fixes the ages, when persons of sound mind may execute a will, is indicative of the judgment of the legislature that a person under that age is not of sufficient mental capacity, presumably, though with ordinary intelligence, to execute such an instrument, and possessed of the mental qualifications thus prescribed.

By section 23 of 3 *R. S.*, 60 (6 ed.), every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, may give and bequeath personal estate by will, and it seems to me that that provision is a legislative intimation, that persons under that age are presumed to be mentally incompetent to the disposition of their property by will. The discrimination between males and females must be based upon the theory, which is confirmed by common experience, that females mature earlier than males, and though the decedent was disposing of real estate by her will, yet I do not deem it necessary to consider the discrimination made by the legislature, in regard to the age of those who are authorized by statute to devise their real estate by last will and testament. This power is limited to adults, except idiots and persons of unsound mind, though I am not able to

perceive any substantial reason for such a limitation, except upon the assumption of sound mind, based upon the age of the testator. See section 1, p. 57, of same statute.

But, accepting the statute relating to testamentary disposition of personal property as the standard and test, and comparing it with the testimony given in this case, was the decedent in her mental capacity, at the time she executed the instrument in question, up to that standard? It is true that she appeared to recognize acquaintances, did certain routine domestic work, remembered her sister, and felt unkindly towards Mrs. Townsend for a reason which she seemed not to understand, and to entirely misconceive, for she supposed that she had borrowed money of her, and had not repaid it, while the fact was that the borrowing was of decedent's mother, and her mind seemed to have been materially prejudiced against her sister on that account. It is true also that she attended Sunday-school, and church, and went to familiar places alone, and made trifling purchases under the instructions of others; that she could repeat the Lord's Prayer, remember a text of the clergyman, and state something of what he said; that she stated she intended to give her property to her second cousin, and that her sister should not have it, for reasons above stated, and because she had neglected her; and that she, after its execution, stated that she had made a will, thus disposing of her property, and that she went to the attorney who drew the will, and gave him instructions as to what she desired to do with her property.

Taking all these facts into consideration, with the other indisputable facts proved by witnesses on both

sides, that though she attended school for three years, she did not learn to read or write, never learned to count more than ten, could not tell the time of day from clock or watch, could not add or multiply, had no idea of the value of property, or of money beyond ten cents, could not tell where to go when she left the cars, and when she went out alone to familiar places on familiar streets, carried with her a card with her address, lest she should be lost, it being deemed necessary by her friends ; that she was of weak mind, unable to do or attend to most things which most persons of ordinary mind and intelligence could do ; that she was easily lost ; could not reckon money ; had no idea or understanding of the amount or the value of her property, the value or worth of anything,—it is quite apparent that her intellectual capacity was not equal to that of an ordinary intelligent child of ten years of age.

How can it be said that she had any intelligent understanding of the value of her property, which she was disposing of by will, when she had no appreciation of values ? That fact alone seems to indicate that she could not have known whether she was disposing of property worth five dollars or five millions.

It is very difficult to say that decedent was not laboring under an obvious delusion, which affected her testamentary disposition, in respect to her sister, Mrs. Townsend, unless she was mentally incapable of appreciating the difference between the obligation of that sister to her mother by reason of borrowing \$2,000, and that to herself ; and it is equally difficult to reconcile her will with an intelligent appreciation by her of the relation she bore to her sister who was in the insane asylum, and

her duty towards her, and her just claims upon her bounty.

The circumstance that she went to the attorney, and gave instructions respecting her will, is very materially weakened by the fact that she was accompanied by Mr. Bogart and the devisee, and that the will was of the simplest character, and its terms very easily fixed upon her mind by a little tutoring.

These circumstances, aside from the proceedings in idiocy, seem to me to forbid the admission of this will to probate, but when taken in conjunction with those proceedings and their result, though they are obviously neither conclusive nor binding upon this court in the determination of this case, it seems to be impossible to escape the conviction that decedent, when she made this instrument, was not possessed of sufficient mental capacity to understand the effect of the disposition, and the condition or value of her property, or the just claims of her sisters upon her bounty. For be it remembered that these proceedings were substantially sustained by the testimony of Mr. Bogart and one of his daughters, and that all the efforts to explain and escape the force of the testimony, on the ground that they did not understand the nature of the proceedings and its purpose, in no way controvert the facts to which they testified; and the effort to belittle the significance of that adjudication, on account of Dr. Warner not being present, and the hasty disposition of the case, signally fails, for the testimony of Mr. Boese, one of the commissioners, and that of Mr. Man, an experienced and intelligent lawyer, who made a careful examination of the decedent before the proceedings were taken, and had two interviews, show that the

proceedings were conducted with proper precaution, and leave no doubt in my mind that the finding of the jury was in accordance with the facts.

If this were a case of lunacy, it might very well be that the inquisition in lunacy, two years after the execution of the will in question, might not be very significant, for the reason that lunacy might be the result of disease or sudden accident, or development of hereditary mental taint; but the imbecility of mind which was manifested in the case of the decedent was not one of sudden development, and some of the proponent's witnesses indicate that, in their opinion, after the death of her mother and under the care of the Bogart family, she improved in her mental condition, and its manifestation; and I am of the opinion that, if the decedent was an idiot when the inquisition was had, it is impossible, on the proof in this case and from the nature of the affliction, that she could have been of sound and disposing mind when this instrument was executed.

I am of the opinion that, from the proof in this case, decedent was not of sound and disposing mind when she executed the instrument propounded, and that for that reason the will should be denied probate.

Decreed accordingly.

MATTER OF MILES.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
January, 1881.

MATTER OF MILES.

In the matter of the estate of ABAIL MILES, deceased.

Costs may, by analogy to the practice of the supreme court in equity, be allowed under the Code of Civil Procedure, to each of the parties adjudged to be entitled, in the discretion of the Surrogate.

Time devoted by executors' counsel to examining the law, and drawing and settling the decree, on an accounting which is not contested, is not occupied in "preparing for the trial," within the meaning of Code Civ. Pro., § 2562.

The allowance of \$25, to executors, etc., under Code Civ. Pro., § 2561, is designed to cover all the proceedings, on an accounting where no trial is had, except the preparation of the account; unless, *it seems*, where, objections having been filed, and reasonable preparation made, the objections are withdrawn before trial.

The question, what is a judicial settlement of the account of an executor, etc., under that Code,—discussed.

THIS was an application for the settlement of a decree on an accounting by the executors, required by the Surrogate on the petition of a legatee. The petition also prayed that the executors show cause why they should not be removed, and counsel for both parties asked that their costs be fixed and allowed. The proceedings for removal were not pressed, but the account was filed, no objections thereto being interposed, nor was there any hearing on the merits. The proposed decree not only adjusted the account, but directed that after paying commissions, and expenses of accounting, the executors pay over to the party entitled the balance of income in their hands, and hold the residue of the estate under the provisions of the will.

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The petitioner's counsel presented an affidavit showing that in preparing for, and taking the proceedings, attending court, examining the account, and other matters connected therewith, he had expended thirty-two days, and asked that there be allowed to his client \$10 per day therefor, while counsel for the executors filed an affidavit setting forth that in the preparation of the account, attending court, preparing and attending to settle the decree, he had expended eleven days, and asked a like allowance.

FAIRFIELD & WASHBURN, *for the motion.*

HUGHSON & WEBBER, *opposed.*

THE SURROGATE.—As this is the first application made to the Surrogate personally for the fixing of allowances under the new Code, I deem it proper that a careful consideration of the authority of the court in the premises should be made.

Section 2558 makes it discretionary with the Surrogate whether to award costs in a case like the present, and by section 2561, a like discretion is given ; but by that section, as I interpret it, the disbursements and \$25 to the party are the maximum allowance which can be made to the petitioner, as there has been no trial or hearing upon the merits before the Surrogate. Section 2562 does not apply to an allowance to be made to the petitioner, but limits such additional allowance to the executor, etc., upon a "judicial settlement" of his account. I am embarrassed by the silence of the first-named section, as well as of all the other sections relating to costs, as to whether the allowances may be made in the amounts named, in the discretion of the Surrogate, to *each* party who shall be adjudged entitled,

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or to the party, who succeeds ; or, in case it shall appear that all are entitled, the sums named are to be divided among them ; but I am constrained, from the analogy of the practice of the supreme court in equity, to hold that such allowances may be made to each of the parties adjudged to be entitled, in the discretion of the Surrogate.

It is claimed by the executors' counsel, that he is entitled to an allowance for his disbursements and \$25, under section 2561, and such a sum as the Surrogate deems reasonable for counsel fees, and other expenses, not exceeding \$10 for each day necessarily occupied in preparing his account for settlement, and otherwise preparing for the decree, including attendances at court ; for the reason that this is a "judicial settlement" of the account of the executors, within section 2562.

But for the fact that all the parties interested in the estate *happen* in this case to be before the court, it seems to me that this would be an intermediate account required by the Surrogate, under § 2723 ; and yet, by § 2514, subd. 8, "judicial settlement" is defined to be a decree of this court, whereby the account is made conclusive upon the parties to the special proceeding, and it is entirely clear that this account settled by the decree is, as every other account so settled, "conclusive as between the parties to the proceeding," although the executors were not required, under § 2724, to "judicially settle their account."

The ninth subdivision of section 2514 defines an "intermediate account" as one filed for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, not made the subject

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of a "judicial settlement;" and yet, by section 2723, the account is denominated intermediate, where the application for the issuing of execution, or for the payment of a claim or legacy, is made, and there is no provision for a contest of such an account.* Without such a provision it is not apparent how it can be useful for any practical purpose, and the theory of the Code seems to be that when there shall be a filing of an account intermediate, under the order of the Surrogate, in order to a valuable investigation as to the correctness of the account, there must be a requirement by the Surrogate, that the same be "judicially settled," and even then, under section 2730 it would appear that no parties would be entitled to contest the account, unless the application for such judicial settlement shall be made *by the executor or administrator*. Why an intermediate account filed on direction of the Surrogate, as a means of determining the duty of the representative of an estate towards a claimant, as creditor, distributee, or legatee, should not be in readiness for objections, and contest thereon, is not apparent, and why an additional proceeding to require a judicial settlement is necessary is equally obscure, as such accountings do not require all the parties interested in the estate on ultimate distribution to be brought in, but only the representative of the estate.

I am of the opinion that this accounting was a "judicial settlement" of the executors' account; that the petitioner is entitled to his disbursements, and \$25; that the executors are entitled to their disbursements, and \$25;

* Such a contest is now allowed. See Code Civ. Pro., §§ 2562, 2730, as amended in 1881.

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that, in addition thereto, they are entitled to \$30, for three days devoted to preparing the account and schedule, and that they are not entitled to any allowance for attendances at court, examination of the law, and drawing, or settling, the decree, for the reason that they were not devoted to "preparation for the trial." The theory of the codifiers seems to have been that the \$25 should cover all the proceedings except the preparation of the account, where no trial was had ; unless, perhaps, where objections were filed, and reasonable preparation made, and, before the trial commenced, the objections were withdrawn for any reason.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
February, 1881.

WEED v. WATERBURY.

In the matter of the application for letters of administration upon the estate of BENJAMIN WATERBURY, deceased.

Where, after the verification of a petition for letters of administration upon the estate of a decedent alleged to have died an inhabitant of, and left assets in the county, and before the grant thereof, one to whom foreign letters had been granted applied for ancillary letters here,—*Held*, that, under Code Civ. Pro., § 2696, the former application, not having been disposed of, might be granted, and that it was not necessary to refer the question of decedent's residence, or to appoint a temporary administrator, to collect rents about falling due.

THIS was an application by Charles G. Weed, a nephew of decedent, for letters of administration upon

decedent's estate, on the ground that decedent died in this city in November, 1880, being an inhabitant of this county, and leaving assets therein.

The petition was verified January 3, 1881, but the issuing of letters was delayed, in consequence of difficulty in procuring the requisite sureties ; and subsequently an application was made by a remote relative for ancillary letters, showing that the decedent died an inhabitant of Connecticut, and that the proper officer had issued letters to him there.

It was claimed, on the part of the petitioner for letters ancillary, that he was entitled thereto, unless it should be adjudged that decedent died an inhabitant of this county,—which was denied by several affidavits ; and that it was the duty of the Surrogate to refer that question, and in the interim to appoint a temporary administrator, with power to collect certain rents which were about falling due.

THE SURROGATE.—I see no necessity for either such a reference, or the appointment of a temporary administrator ; for, assuming that the decedent was not a resident of this State at the time of his decease, yet having left assets in this county, the Surrogate has jurisdiction to appoint an administrator (3 *R. S.*, 76 [6 ed.], § 24, subd. 2) ; and the application for ancillary letters does not prevent the issuing of letters to this petitioner (see *Code. Civ. Pro.*, § 2696, subd. 2), as the petitioner is a relative of decedent, legally competent to act, and has made application to the Surrogate having jurisdiction, and the application has not been finally disposed of.

I am, therefore, of the opinion that, on giving the

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requisite security, the petitioner is entitled to letters. This determination is independent of the question of the residence; and the rights of all parties may be protected upon that question on the final accounting and the distribution of the estate.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
February, 1881.

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*In the matter of the guardianship of ANNIE SWEENEY,
an infant.*

The mother of the infant, before her death, confided the custody of her child, who was of tender years, to the petitioner, to maintain and educate in her religious faith. Upon *habeas corpus*, by an aunt, to obtain possession, the supreme court awarded the custody of the infant to the petitioner; whereupon another aunt, without mention of those proceedings, procured, from the surrogate's court, letters of guardianship, which petitioner applied to have so modified as to award the custody to herself. *Held*, that the application of the aunt for letters of guardianship was an attempt to circumvent the order made on *habeas corpus*; that the petitioner had a right to institute these proceedings; and that the letters should be revoked, as to the infant's person, and the petitioner be appointed guardian thereof, unless the guardian should traverse the allegation that the infant's interests required the appointment of another guardian.

The words "in his behalf," at the beginning of Code Civ. Pro., § 2832, refer to "the ward," and not to "any relative;" the intention of the section being to enable any person to apply for a revocation of letters of guardianship, as where no relative of the infant is willing to make the application.

As to whether a suppression of facts is equivalent to a "false suggestion of a material fact," under subd. 4 of that section, *quære*.

APPLICATION by Christiana Bolling, for the award, to her, of the guardianship of the infant's person.

The petitioner alleged that the infant, who was of the age of eight years, was in her custody, and had been since the death, in 1880, of the infant's mother, who, a long time before her death, requested petitioner to take care of, maintain and educate the child, and committed her to petitioner's custody, and that she had so maintained and educated her to the present time, and was able, willing, and desirous to do so, and to become her guardian. That on January 31, 1881, on the petition of one of the mother's sisters, Mr. Justice BARRETT issued a writ of *habeas corpus* directed to petitioner, upon which she produced the infant and made return to the writ; which return was traversed by the petitioner in that proceeding, whereupon said justice, after a hearing, dismissed the writ, and awarded the custody of the infant to petitioner. That subsequently thereto, Ellen Coughlin, another aunt, applied to this court for letters of guardianship of the infant, upon the waiver of the right thereto of the petitioner in the *habeas corpus* proceedings, and, without any notice to this petitioner, or any statement of the proceedings before and determination by Mr. Justice BARRETT, obtained letters from this court, and that the proceedings for those letters were not taken in good faith, or in the infant's interest. That petitioner was bringing up the infant in the religious faith of her parents, who were Roman Catholics, and that she provided her with a teacher in that faith, and sent her to church and Sunday-school, as requested by her mother; and averred, on information, that said Ellen was not a proper person to be the guardian, and prayed that petitioner be

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appointed such guardian, or that the letters already issued to said Ellen be so modified as to award the guardianship of the infant's person to petitioner.

The order in the supreme court was dated February 4, 1881, and concluded, "and it is further ordered that said Annie Sweeney be, and she hereby is remitted to the care and custody of said Christiana Bolling, to whom the custody of said infant is hereby awarded until the further order of this court."

The petition of Mrs. Bolling was accompanied by several corroborating affidavits, tending also to show that the best interests of the infant would be subserved by committing her care, custody and education to the petitioner. The petition for letters of guardianship was dated February 5, 1881, and signed by Ellen Coughlin, by mark, and the letters were issued February 7, 1881.

TAYLOR & PARKER, *for petitioner.*

THE SURROGATE.—An interview with Judge BARRETT, since the submission of this motion, has confirmed me in my opinion entertained on examining his order, that that painstaking judge carefully investigated the matter upon its merits, having reference to the suitability of the petitioner and of the minor's aunts to have the custody of said child, and that his order was not made upon any mere technicality, but was based upon his conviction that the best interest of the infant required that petitioner should retain the custody of her, upon the well settled equitable prerogative of the court, to regard such interest as the paramount and controlling consideration, in making such award.

It is quite apparent that the application for letters of

guardianship was made with the purpose of overcoming the effect of Judge BARRETT's order, and of circumventing his award of the custody of the minor to petitioner, as a suitable person to retain such custody, by interposing the strict legal right conferred by the letters issued by this court, which were issued in ignorance of the proceedings before said justice, and of the petitioner's claim to such custody under the verbal authority of its mother. I hardly need state that, if these facts had come to the knowledge of this court, notice of the application for letters would have been required to be given to the petitioner, and that it would have been my duty to have instituted a careful investigation of all the facts bearing upon the custody of the minor, having reference to her best interests.

It is, however, objected by the counsel for the respondent that, as the petitioner is not a relative of the infant, she has no right to ask for the revocation of the letters, and to this end he refers the words "in his behalf," in section 2832 of the Code, to the words "any relative;" while it seems to me that this is an entirely erroneous interpretation, and that it was the intention of the section to enable "any person" to make the application to revoke, in the ward's behalf; otherwise a guardian, in a case where the ward should have no relatives, or none willing to make the application, would be able utterly to disregard the obligations of his trust, and dissipate the trust funds. I entertain no doubt of the right of the petitioner to institute these proceedings.

The next objection urged by counsel to this motion, is that the letters were issued upon the proper petition, and cannot be revoked, except under section 2832, above

cited, and that the facts set forth in the petition do not bring the case within the provisions of that section. It is, probably, technically true that the grant of letters was not obtained by "false suggestion of a material fact," though there was a suppression of facts which would have materially affected the determination of this court on the application, if they had been known. But I am of the opinion that the petition and accompanying affidavits brings this application directly within subdivision 6 of the section referred to, and that it becomes the duty of this court to make full investigation of those facts, as they bear upon the true interest of the minor, if they shall be properly traversed; otherwise that the letters be revoked, so far as they award the custody of the person of the minor, and that the petitioner, on proper application, be appointed the guardian of the person of said minor.

But in case the respondent shall, within two days after service of a copy of the order to be entered herein, interpose an answer to the facts set forth in the moving papers, the matter may be then referred to a referee, to take the testimony, as to whether the appointment of another guardian will best promote the welfare of the minor, and in the meantime all proceedings on the part of the respondent, under her letters as guardian of the person of said minor, may be stayed.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
February, 1881.

SCOVEL v. ROOSEVELT.

In the matter of the accounting of JAMES A. ROOSEVELT, surviving trustee under the last will of JAMES I. ROOSEVELT, deceased.

The testator, by his will, divided his residuary estate among his children, directing his executors, as trustees, to invest, in their own names, each child's share, and to receive the interest and income of each share, for the use of the children, respectively, during life, with remainders over. Under an offer of the United States government, to give its four per cent. bonds in exchange for an equal amount of outstanding six per cents., known as five-twenties, and pay accrued interest, together with three months' additional interest on the latter, the surviving trustee exchanged five-twenties, trust funds, and credited the accrued and additional interest thereon to income, and three months' interest on the four per cents. received in exchange, to capital account. The life tenants claimed the double interest for the three months after the exchange. *Held*, that the trustee's account was right in substance, but wrong in form, and that,

1. The accrued interest on the five-twenties, and all interest on the four per cents., belonged to the life tenants.
2. That one-third of the three months' additional interest on the five-twenties enured to the life tenants as an equivalent for the abatement of income, and the residue belonged to the remainder-men, as an accretion to the capital.*

Testamentary trustees, charged with the duty of investment, have the right to change the investment, when the best interests of the beneficiaries seem to demand it, but are bound to exercise good faith and justice towards both life tenants and remainder-men.

As between these classes of claimants, anything in the nature of premium, that is, any appreciation in the value of capital, is to be regarded as principal, and all interest, income or proceeds, however extraordinary or unusual, belong to the life tenant.

THIS was a hearing of objections, filed by Marcia O.

* Compare *Farwell v. Tweddle*, 10 Abb. N. C., 94.

R. Scovel and Frederick Roosevelt, children and beneficiaries under the will of decedent, to the account rendered by the surviving trustee under said will, on his second annual accounting.

The facts, as agreed upon, were that the testator, by his will, gave to his executors, and the survivors and survivor of them, all of his residuary estate in trust, to divide the same into as many shares of equal value as he might have children living at his decease, and to set apart one of such shares for each child, to be invested in the names of his said executors as trustees for each child respectively, and upon the further trust, to receive the interest and income of each share, and apply the same to the use of such child during his or her natural life, with remainders over.

The United States Government, in order to facilitate the refunding of its five-twenty bonds, having offered to exchange its four per centum bonds for an equal amount of any of its outstanding and uncalled six per centum five-twenty bonds, and to pay in addition thereto, to the holders of the latter, the accrued interest, and additional interest for a period of three months, the said trustee availed himself of this offer, surrendered the six per cent. bonds held by him for each of said trusts, and received in exchange therefor an equal amount of the four per cent. bonds, and at the time of such surrender, also received the accrued interest on said six per cent. bonds, and the additional three months' interest, not then due thereon, in accordance with the offer of the United States Government, and carried the accrued interest and additional interest to the credit of the income account of the two trusts; and when he received the interest, as the same

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became due and payable, upon the four per centum bonds, he carried the three months' interest, which had accrued due immediately after the exchange, to the credit of the capital account of the trusts.

The contestants, life tenants under the trusts created by the will, claimed the three months' interest on the four per centum bonds, in addition to the interest on the five-twenties given in exchange therefor, carried to the credit of their income account for the same period.

BARTLETT & WILSON, *for contestants.*

DE WITT, LOCKMAN & KIP, *for trustee.*

THE SURREGATE.—The only question to be considered, under the objections filed herein, seems to be whether the two life tenants are respectively entitled to the three months' additional interest upon the five-twenty bonds, from the date of the exchange, and allowed to the trustee under the offer of the United States Government, and also to the interest received by the trustee upon the four per centum consols for the same period of time, and if not so entitled, then to how much and what parts thereof.

Under the terms and conditions of the will, the trustee is authorized and directed "to receive the interest and income of each share, and apply the same to the use of such child during his or her natural life." Each of the contestants herein is, therefore, severally entitled to the *interest and income* of his or her share, and to no more, the capital of each of said trust funds being required to be kept intact for the remainder-men. If the three months' additional interest, received by the trustee upon the five-twenty U. S. bonds, after their exchange into the four

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per centum U. S. consols, was in reality interest upon the first mentioned bonds, then these beneficiaries are entitled to be credited therewith ; but was the amount thus received by him, in fact, such interest or income ?

Interest is defined to be compensation for the use of money, and income is gain from invested property. Now it is very evident that the so called three months' additional interest, received upon the U. S. five-twenty bonds after they were surrendered and refunded, cannot in any proper sense of the term be denominated interest or income, as being compensation for the use of money, or gain from invested property, for the reason that said bonds had lost their identity and were merged into another security bearing another and different rate of interest ; otherwise it would be true that for the three months indicated, the beneficiaries herein would be entitled to double interest upon the same funds, viz., six per centum upon the five-twenty bonds and four per centum upon the four per centum consols, making in all ten per centum upon the trust funds, for the same period of time ; whereas there was but the one investment in four per centum consols, after the surrender and refunding of the five-twenty bonds.

From all the facts, I am forced to the conclusion that the amount received by the trustee upon the five-twenty bonds, and denominated, in the circular of the U. S. treasurer, three months' additional interest thereon, was not either interest or income, but merely a bonus offered by the U. S. government to the holders of said five-twenty bonds, as an inducement for them to refund the same in the four per centum consols. But the amount of bonus was presumably controlled by the time the five-

twenties had to run, and the rate of interest they bore, and hence it seems to me that but four of the six per centum can be regarded as a bonus paid on account of the capital, and the additional two per centum as consideration for the reduced rate of interest, and that such two per centum, and the four per centum payable by the new consols, stands in the place of the six per centum, to which the life tenant would have been entitled if no exchange had been made.

This view, while it does not change the figures of the account, seems to me to recognize the right of the trustee to change investments, whenever the best interests of the beneficiaries seem to demand it, and yet holds him to good faith and justice to both life tenant and remainder-men. It cannot be said that the trustee would not have been justified in making such exchange, with reference to a more permanent investment, without any bonus, or that it would have done injustice to the life tenant; but as he has received such bonus, and a part thereof was the emanation of the interest which could have been received at the end of the three months, upon well settled rules of equity the life tenant should, in my opinion, participate therein.

In *Townsend v. U. S. Trust Co.* (3 *Redf.*, 220), where a testator gave \$5,000 in trust to his executors, to invest the same and pay the interest, income or dividends arising therefrom to his son during his life, and the executor had invested the same in government securities, which had increased in value, and the sale thereof had produced a larger fund than originally invested therein, I decided that such increased value could not be adjudged to be interest, income or dividends, which pre-

suppose profits realized from the use of the trust funds, but that the said increased value belonged to the remainder-man, inasmuch as it was an enhancement of the value of the security.

Where an extraordinary dividend was declared upon certain stock, included in the share of the testator's estate, bequeathed to his two daughters for life, with remainders over, Mr. Justice JAMES, in delivering the opinion of the court, decided that, from the terms of the will it was clear that the testator intended that all the gains, profits, income and proceeds of said two shares of his estate, of *whatsoever kind, name or nature*, should go to his said daughters as tenants in common for life, and that, by the terms of the will, the daughters were entitled to the extraordinary dividend, as in the very nature of things, dividends arising from stock investments must be fluctuating in amount, depending upon a variety of contingencies, which no wisdom could foresee or financial skill control ; but in the same case, it was also held that the bonds of the Central Railroad Company, given to the trustees as the difference between the value of the stock of the old railroad companies and that of the new company, was neither interest, dividends nor proceeds, and should therefore be regarded as capital (Clarkson v. Clarkson, 18 Barb., 646).

This case is referred to by the counsel for both parties, as having some bearing upon the questions at issue in the matter now under consideration ; by the counsel for the contestants, because the extraordinary dividend therein referred to was held to belong to the life tenants ; and by the counsel for the trustee, because the same case holds that the terms of the will should govern as to

the disposition of said dividend, and also for the reason that it holds that the difference in value between the old and new stock was an accretion of the capital of the estate, and consequently belonged to the remainder-men.

It is very clear that the amount received by the trustee herein, was in no proper sense of the term a dividend, either ordinary or extraordinary, upon the fifty-two bonds, and consequently the case last cited, so far as it adjudicates upon the question of the proper application of dividends upon stock, does not determine the issue herein, but it may, and doubtless does, have a bearing upon the question as to the intent of the testator, and also as to what may be regarded as an accretion of the capital of the estate.

The following cases are cited in the brief of contestants' counsel, viz.:—*Norris v. Harrison* (2 *Madd.*, 279); *Price v. Anderson* (15 *Sim.*, 473); *Bates v. Mackinley* (31 *Beav.*, 280); *Johnson v. Johnson* (5 *Eng. Law & Eq.*, 164); *Murray v. Glasse* (17 *Jur.*, 816); *Cuming v. Boswell* (2 *Jur.* [N. S.], 1005); *Clive v. Clive* (*Kay*, 600); *Ware v. M'Candlish* (11 *Leigh*, 595); *Lord v. Brooks* (52 *N. H.*, 77); *Earp's Appeal* (28 *Penn.*, 368); 2 *Perry on Trusts*, §§ 544, 545. I have examined nearly all of the above cases, and find that the decisions therein substantially turn upon the question of the proper disposition of extraordinary dividends upon stock, and although there appears to be some diversity in those decisions, yet I concur, in the main, with the conclusion to which the counsel for the contestants has arrived, that the outlook of all the cases seems to be that, disregarding forms, the court will treat anything in the nature of premium, that is to say, an appreciation in the value of

the capital, as capital, and anything that is interest, income or proceeds, no matter how extraordinary or unusual it may be, as belonging to the life tenant.

But I fail to see how the said cases can govern the decision of the question now under consideration, for the reason above stated, that the so called three months' additional interest, received by the trustee upon the five-twenty bonds after they were surrendered and refunded under the circumstances above stated, cannot, in any proper sense of the term, be denominated a dividend, ordinary or extraordinary.

I am therefore of the opinion that contestants are entitled to be credited with the accrued interest, at the time the said five-twenty U. S. bonds were refunded into the four per centum U. S. consols, and also with all the interest upon the said consols after the date of such refunding; and that the so called three months' additional interest, allowed upon the said five-twenty U. S. bonds upon their surrender, should be credited, four per centum thereof to capital as aforesaid, and two per centum thereof to income as aforesaid, and that the decree to be entered herein should so provide.

Decreed accordingly.

MATTER OF JACKSON.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE —
March, 1881.

MATTER OF JACKSON.

*In the matter of the probate of the will of ROBERT
JACKSON, deceased.*

The testator, by his will, gave all his property to his wife, unless she died before him, and in that case to others, including a legacy of \$2,000 to A. By a first codicil, he revoked this legacy to A.; by a second codicil he confirmed the will and the first codicil, so far as consistent with the second; and bequeathed legacies, etc., to others than his wife, to the amount of \$18,500, gave his wife's wardrobe and jewels to B., "according to her directions," and the residue to his nieces. Upon an application, by the widow, for a construction of the instruments,—*Held*, that the last codicil was obviously intended to be conditional on the non-survival of testator's wife, and that, this contingency not having happened, she was entitled to the entire estate.

APPLICATION for the construction of a will and codicils.

The petitioner, the widow of testator, in addition to the probate of the will and two codicils, asked a construction thereof, particularly of the last codicil.

By the will, decedent gave and bequeathed all of his property to his wife, but in case she did not survive him, he gave \$2,000 to Kate Bajot, and the residue to two nieces, Ellen and Charlotte Nicholl, equally, and appointed his brother, D. L. Jackson, a non-resident alien, executor. The will was dated May 11, 1878. On December 16, 1879, he revoked the \$2,000 legacy to Kate Bajot, by codicil, and on May 20, 1880, he executed a codicil confirming his will and first codicil, so far as the latter codicil was consistent therewith, and gave two

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legacies of \$5,000 each, to churches named, \$500 to Mrs. Henry, \$3,000 to be expended on his father-in-law's Greenwood Cemetery plot, his wife's camel hair shawl, according to her direction, to Mrs. Mallory, his wife's wardrobe and jewels to Lizzie Bajot, under her direction, and the residue equally to four nieces named.

TOWNSEND WANDELL, *for proponent.*

THE SURROGATE.—The question to be determined is whether the disposition of decedent's property by the last codicil was intended to be made on condition that his wife should not survive him, for if not, the codicil would appear to dispose of the entire property without recognition of the widow's rights or claims. It seems to be my duty to consider the provisions of the will and codicils together.

The recitation in the last codicil, that he confirms his will and first codicil so far as the last is consistent therewith, seems to be entirely unmeaning, if he intended to make a complete disposition of his property by the last, except as to the appointment of an executor; and the gift of his wife's shawl, wardrobe, and jewels, pursuant to her direction, seems to me to be entirely inconsistent with the idea that she should survive him. I am, therefore, of the opinion, that the last codicil was intended to make disposition of his entire estate, only in the event stated in the first clause of the will, that she should die before him, or that they should be lost together at sea; and that the last codicil is contingent upon that condition which has not happened, and that the wife, having survived the testator, is entitled to the property; and the other provisions of the will, disposing of the prop-

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erty upon the contingency above stated, and the two codicils, are inoperative.

The will and two codicils having been duly proved, should be admitted to probate, and the decree contain the construction and effect of the will and codicils, as above adjudged.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
March, 1881.

WOODHOUSE v. WOODHOUSE.

*In the matter of the estate of CHARITY WOODHOUSE,
deceased.*

Before the Code of Civil Procedure, the only mode of enforcing a Surrogate's decree for the payment of money was an attachment against the person, in form similar to that used by the court of chancery in analogous cases.

Section 2555 of that Code, providing for the enforcement of such a decree by punishment for a contempt, applies only where the special proceeding, terminating in the decree, was commenced before September 1, 1880.

Where the moving papers, on an application to punish for a contempt under that section, do not show previous service of a certified copy of the decree on the alleged delinquent, the motion should be denied.

It seems, that it is not permissible, after procuring an order requiring an administrator to sell property, upon allegations that it is inventoried at too low a price, and that the administrator should be charged with the actual value, as disclosed on a proper sale, which has been had, to claim that the inventory valuation shall be a measure of the charge against him.

APPLICATION by Claiborne O. Woodhouse, for the punishment of James F. Woodhouse, administrator, &c., of decedent, for contempt, for not obeying a decree of

this court, dated April 22, 1879, directing him to pay to the petitioner or his counsel \$120, paid by him for auditor's fees on the accounting, and also \$240.37 the amount of petitioner's share of said estate.

The petition set forth the making of the decree, a motion by the administrator to vacate it, which was denied, a demand by petitioner, and refusal.

On the return day of the order to show cause, it was shown by the administrator that, on his accounting, he charged himself \$750 for certain unsold chattels, appraised at that sum, and that thereafter petitioner obtained an order from the Surrogate, requiring the administrator to sell the same, at public sale, or otherwise, and that he sold them at public auction, on due notice to the petitioner and his attorney, who attended the sale, and that the property brought but \$411.20, whereby a loss of \$338.80, besides a large bill of expenses, was occasioned. Thereupon the administrator was granted leave to move a modification of said decree, by deducting the last named sum from the amount charged against him therein, and the application to punish was suspended for that purpose.

The motion for a modification was opposed by petitioner, who presented affidavits of unfairness in the sale, and inadequacy in the prices realized.

J. H. HULL, *for petitioner.*

SAMUEL WILLIAMS, *for administrator.*

THE SURROGATE.—The administrator submits the affidavit of himself and of the auctioneer, for the purpose of showing the good faith of the sale, raising an issue of

fact which it is impossible for me to determine on affidavits, and the question must be sent to a referee if the administrator persists in his motion to modify the decree.

Very strenuous objection was interposed to the right of the administrator thus to move for such modification, but the contestant was instrumental in procuring an order requiring the sale, under the allegations that the property was inventoried at much less than its value, and that the administrator should be charged with the actual value as disclosed on a proper sale. It is therefore self-evident that, if the sale was honestly and properly conducted, it is too late now for the contestant to claim that the amount of credit which he then disputed, shall be the measure of charge against the administrator. Hence it is plain that the motion for an attachment, as for a contempt, cannot now be granted, if it might have been in case there had been no application for the modification of the decree, but it is quite clear to my mind that the petitioner would not then have been entitled to such a process, for the reason that the only mode of enforcing a decree for the payment of money in this court, prior to the present Code, was under 3 *R. S.*, 327 [6 ed.], § 10, subd. 4, by attachment against the person, in form similar to that used by the court of chancery in analogous cases (*Re Draper*, *Daily Register*, Dec. 6, 1878; *Watson v. Nelson*, 69 *N. Y.*, 536). It is true, by section 2555 of the Code, a decree for the payment of money may be enforced by punishment for a contempt, but by subdivision 11 of section 3347, that section does not apply to the decree in question, which was in a "special proceeding" commenced prior to September 1, 1880, and was entered before that time.

The language of so much of that subdivision as bears upon this question is: "So much of chapter 18 as regulates the proceedings to be taken in a 'special proceeding,' and the effect thereof, applies only to a 'special proceeding,' commenced on or after the first day of September, 1880." The "special proceeding," in which it is proposed that the attachment as for a contempt, to enforce the decree in question, shall issue, was the accounting proceedings of the administrator; and it is clear to my mind that any process issued to enforce a decree is a proceeding in that "special proceeding," resulting in the decree to be enforced, and that the word "proceeding," and the expression "special proceeding" have an entirely different signification; otherwise there would have been no need of the exception referred to, as each proceeding would then be denominated a "special proceeding." I am confirmed in this opinion, by the exception immediately following the provision above quoted, which is that sections 1670 to 1685 apply also to proceedings therein specified, taken after that date, in an action theretofore commenced, and upon a judgment theretofore rendered, the object of making this latter exception being to take those sections out of the provision, that actions commenced before the time specified should not be affected by the Code.

It will be observed that those sections relate to the enforcement of judgments, and prescribe certain duties after the sale, and the disposition of the proceeds thereof, and the entry of a judgment in another county; and yet it was deemed necessary to take those sections out of the provisions prescribing the effect of the Code, as to proceedings in actions commenced before September 1, 1880,

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and if the enforcement of a decree or judgment by execution or attachment is not in the original action, what was the necessity of excepting the proceedings for such enforcement from the force of the provision, that they should not be affected by the Code.

In *Bank of Genesee v. Spencer* (15 *How. Pr.*, 412), it was held that a supplementary proceeding was a proceeding in the action. In *Pitt v. Davison* (34 *How. Pr.*, 355), it was held that an order to show cause why a party should not be punished for contempt, in refusing to obey the judgment in a civil action, was a proceeding in the action, and that all the papers were to be entitled therein. And in *Seeley v. Black* (35 *How. Pr.*, 369), it was again held that proceedings supplementary to execution were proceedings in the action, and that costs therein should be taxed as costs in the action, instead of costs allowed in special proceedings. It is clear that section 2555 regulates the proceedings to be taken to enforce a decree in the Surrogate's court, directing the payment of money, etc., and is therefore, by subdivision 11 of section 3347, confined in its application to special proceedings commenced on or after September 1, 1880.

If this were not so, the motion in this matter would have to be denied, for the reason that the moving papers do not show that a certified copy of the decree sought to be enforced has been served upon the administrator, as required by section 2555.

Motion denied.

JOEL v. RITTERMAN.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
March, 1881.

JOEL v. RITTERMAN.

In the matter of the estate of AMELIA WILSON, deceased.

A decree was obtained February 24, 1880, against an executor, on final settlement of his account, directing him to pay a sum of money to a legatee. Upon an application for an attachment against him, for non-payment, he set up, as reason for failure to pay, his insolvency and the want of means or property, of his own or belonging to the estate, with which to pay any portion. *Held*, no defense.

APPLICATION by a legatee against the executor, for an attachment, for the non-payment of the sum of \$483.47, with interest from January 1, 1871, pursuant to a decree on final settlement of his account, entered February 26, 1880.

The petition of Mrs. Joel, daughter of decedent, set forth an entry of the decree; that a certificate was filed and docketed in the clerk's office; that execution was thereon issued against the property of the executor, Ritterman, and returned unsatisfied; that a certified copy of the decree was served upon the executor; and asked that an attachment issue against the executor for non-payment.

On the return of the order to show cause, the executor filed an affidavit that he had neglected to pay the amount of the decree, for the reason that he had no money, nor means, nor property, with which to pay the same or any part thereof; that he had been insolvent since 1869, and since then had had no property, nor

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money, of his own or belonging to the estate, with which to pay any portion of said sum.

G. P. AVERY, *for petitioner.*

THE SURROGATE.—The manner in which the motion was argued indicated that the attachment sought was under section 2555 of the Code, as for a contempt, which has no application to the proceedings, the decree having been entered before September 1, 1880 (§ 3347, subd. 11). But the moving papers seem to justify the issuing of an attachment under section 10, subd. 4, of 3 *R. S.*, 327 (6 ed.), which must be in form similar to that used by the court of chancery in analogous cases.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
March, 1881.

OVIEDO v. DUFFIE.

*In the matter of the application for probate of the will
of ALFRED N. DUFFIE, deceased.*

A surrogate's court has no jurisdiction, under Code Civ. Pro., § 2476, of the probate of the will of one who, at the time of his death, was a resident of this State, unless it is also shown that he resided in the county in which that court is located.

APPLICATION for the probate of a foreign will, and to compel the production of a copy thereof, for that purpose.

The petition of Maria de la Salud Oviedo, younger, set forth that the decedent, U. S. consul at Cadiz, Spain,

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died November 8, 1880, leaving a will, executed there, on file in the office of a notary, together with a codicil thereto; that decedent was a citizen of the United States, and was at, or immediately previously to his death, an inhabitant of the State of New York, temporarily resident at Cadiz, leaving assets in the city and county of New York, and prayed the probate of said will, and that Mary Ann Pelton Duffie produce an authenticated or exemplified copy of such will for that purpose; among other things stating that the original will in question, under the laws of Spain, must remain in the custody of the notary, but that such copy has by the laws of Spain the same effect as the original.

OLCOTT & MESTRE, *for petitioner.*

COUDERT BROS., *for M. A. P. Duffie.*

THE SURROGATE.—Other serious questions might arise in respect to the authority of this court to probate or establish any such instrument, but, as the petition does not show that this court has jurisdiction in the matter, it seems unnecessary to pass upon any other question. Section 2476 of the Code prescribes the jurisdiction of the Surrogate in the matter of probating wills, and the first subdivision thereof gives to the Surrogate authority to prove wills, grant letters testamentary, etc., where the decedent was at the time of his death *a resident of that county*, whether his death happened there or elsewhere; and it is clear to my mind that, as decedent was a resident of this State, at the time of his death, in order to confer jurisdiction upon this court for the probate of his will, it must appear that he was a resident of *this county*, for the other subdivisions of that section relate to cases

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where decedent was not a resident of the State. It seems to me clear that, if decedent, though a resident of this State, was a resident of another county therein, the Surrogate of that county has, under the section cited, exclusive jurisdiction.

I am therefore of the opinion that the petition should be dismissed, as not showing jurisdiction to entertain it in this court.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
March, 1881.

TUCKER v. FIELD.

*In the matter of the probate of the will of JULIA M.
STANTON, deceased.*

A citizen and resident of this State could not establish a domicile in France, under the empire, without an authorization of the emperor, under chap. 1, § 18, of the Code Napoleon.

The recital, in a will, that the testator, at the time of execution, is residing at a place named, is not controlling, the term residence being commonly employed in the sense of sojourn.

The fact that a will, executed in a foreign country by one whose domicile of origin is in this State, is executed with the formalities prescribed by the laws of this State, raises a presumption in favor of an intent to retain such domicile.

A party alleging a change of domicile from that of origin holds the burden of proof.

Considerations addressed to the intelligence and good feeling of a testator, which leave him still to his independent choice, or which influence his better judgment, cannot be regarded as undue, to the extent of affecting the validity of the testamentary act.

The testatrix died in 1878, at the age of eighty-four, in Paris, where she had chiefly dwelt since 1869, leaving a will executed in 1877, at the American Legation there, in conformity to the laws of this State, whereby she gave

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the bulk of her estate, consisting of personal property, to two daughters, her only children. The evidence, with respect to her statements and other acts, during her life-time, as indicating an intent to retain or change her domicile, was conflicting. She had executed a previous will in this State, dividing her property equally between her daughters; but the one propounded gave much more to one of them who had become a widow, and was without means of support, while the other was in comfortable circumstances,—the effect being to about equalize their incomes. It appeared that the testatrix had latterly been under the care and influence of the widowed daughter, who had solicited the alteration in the disposition of the estate, and had represented to her the change in condition which justified such an alteration, but it did not appear that any untrue representations had been made. Testatrix was possessed of remarkable mental vigor and a strong will. *Held,*

1. That the testatrix was domiciled in this State at the time of her death, she never having been authorized by the emperor, under the French Code, to establish a domicile in France.
2. That the influence shown was not undue, and that the instrument propounded having been executed conformably to the laws of this State, should be admitted to probate.

APPLICATION for the probate of a will.

The instrument propounded bore date July 14, 1877, and was witnessed by Henry Vignaud and Augustus Biesel.

It recited that the testatrix was late of the city and State of New York, then residing in Paris, revoked all former wills, and appointed John J. Cisco, of New York, executor. Testatrix directed all her debts, funeral and testamentary expenses to be paid, and then gave to her daughter, Eliza L. Tucker, formerly of New York, now of Paris, her furniture left in the house belonging to that daughter in New York, with certain pictures, describing them; to her daughter, Julia M. Field, late of New York, now of Paris, such an amount in bonds as will yield to her an annual income of \$2,300, said bonds being in the care and custody of her trustee and executor, Cisco, to whom she intrusted the valuation and appraisal; also

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silver-plate, a picture, and jewelry ; to her granddaughter, Julia S. Tucker, residing in France, she gave certain silver-plate, and authorized her executor to give her said granddaughter out of New York city bonds, in his custody, sufficient to replace \$3,000, value of a bond supposed to have been lost by her husband ; to her granddaughter Fanny Boulton, late of Paris, now of India, jewelry and laces ; to her four grandsons, naming them, her late husband's library. The residue of her property she bequeathed equally to her two daughters Eliza L. Tucker and Julia M. Field, and recited that Mrs. Tucker had received more largely than Mrs. Field from the estate of her father, and was possessed of property yielding an income adequate to her maintenance ; that Mrs. Field would be destitute, but for the provision made for her. In case Mr. Cisco should not consent to act as executor, she appointed Charles F. Stone, of New York, as her executor and trustee ; then, on reflection, she annulled the item of the library of her husband, and gave the same to her granddaughter Fanny Boulton.

The will was propounded by decedent's daughter, Julia M. Field. Mrs. Tucker, decedent's other daughter, filed objections to the probate : that the instrument was not executed according to the laws of this State ; that decedent was not of sound and disposing mind, but under restraint, and unduly influenced by Mrs. Field, and other persons unknown ; that the instrument, if executed, was so executed by reason of misstatement and misrepresentation made to her, by Mrs. Field and other persons unknown to contestant, in regard to proponent and contestant, and their respective circumstances, and it did not express her true wishes ; that shortly before

its execution she expressed her testamentary purpose, but by undue influence was induced to change the same ; and that the decedent, at the time of her death and execution of the will, was domiciled at Paris, France, and the will was not executed according to the laws of France.

Proponent read in evidence :

1. The deposition of Henry Vignaud, one of the subscribing witnesses, taken on commission in Paris, who testified that he resided in France, and was second secretary of the United States legation ; that he was not acquainted with decedent, and had no recollection of the circumstances attending the execution of the will, but, after reading the attestation clause signed by him, he was satisfied that it was executed at the legation, in his presence, and that decedent declared the same to be her last will and testament, and requested him to sign the same as a witness ; that though he had no recollection of what took place, he was positive that everything was done in the manner in which such things were generally done at the legation ; that testatrix first signed the instrument, and declared it to be her last will and testament, and requested Mr. Biesel and witness to sign as witnesses, and they did so in her presence, and in the presence of each other ; that he had no recollection as to her soundness of mind at the time, but he would have declined to act as a witness if anything had occurred to lead him to suppose she was unsound or under restraint ; that he did not know her age, or whether she came to the legation alone, and that he had no previous acquaintance with her ; that Mr. Washburne, then minister to France, was present.

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2. The deposition of the other subscribing witness, Augustus Biesel, taken on commission in Paris, who testified that he resided in Paris, that he was a messenger at the legation ; had no acquaintance with decedent ; saw her there on the occasion of the execution of her will, when he was present, and that he was a subscribing witness ; that the testatrix declared the instrument to be her last will and testament, in his presence, and requested him to witness the same, in the presence of the persons named ; that Mr. Vignaud was also requested to act as a witness by her ; that he signed in the presence of witness and Mr. Washburne ; that decedent appeared to be a person of sound mind, and under no restraint.

Contestant then read in evidence :

1. The deposition of Mrs. Julia Tucker Clark, taken on commission in Paris, who testified, that she knew decedent, who was witness's grandmother, and died in January, 1878 ; she knew proponent and contestant ; the former was her aunt, and resided in Paris ; Mrs. Eliza Tucker was her mother, residing in Geneva, Switzerland ; decedent left two children, proponent and contestant ; witness was born in New York, and resided in Paris at decedent's death, and had since 1869 ; prior to that in New York ; witness resided in the same house with her from 1868 to 1870, 1873 to 1874, 1875 to 1876, and from June, 1877, to June, 1878, she saw her every day, during the summer ; her relations with decedent were friendly ; witness's mother was in the house with decedent from 1869 until her death, except in the year 1873, and from June to December, 1877 ; witness's sister Fanny lived there from 1869 to June, 1875 ; decedent made her will before she left America, and left it with

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John J. Cisco, whereby she divided her property equally between her two daughters. Before witness went to America in 1874, she conversed with decedent, and asked her to put her mother's portion of the property in trust for witness and her sister ; but she answered that she had made her will, and was too old to make a new one, and that they must manage it after her death ; decedent was about eighty-four or eighty-five years of age at her death, was weakened in memory, and complained that she could not remember names from day to day ; that she was forgetting everything ; she was in that state in July, 1877, and for some months previous to her death ; she went out very seldom, during several months prior to July, 1877, and until her death ; she was accompanied by proponent and her son ; during the last years of her life she rarely wrote letters, or read those addressed to her, but procured some one to write for her, and read hers ; witness and proponent frequently read her letters to her ; witness wrote for her, but none of her business letters ; decedent kept her accounts herself, after she came to Europe, until 1875, and after that proponent kept them, as her judgment and decision were much enfeebled ; she was enfeebled in mind and body, peevish and unreasonable, subject to fits of speaking childish things. Shortly after contestant left for Geneva, in the summer of 1877, witness found decedent weeping because her dinner was not brought up, and said she should die ; witness had seen her violently excited and weep, because a milliner did not follow her instructions in making a cap or a bonnet ; proponent attended to all her business matters, wrote letters, kept accounts, and signed checks, from June, 1875 ; prior to that witness's sister, who was

then married, had attended to those matters ; during the last years of her life, decedent was dependent on proponent, and was influenced in her judgment and decision by her ; she was influenced and prejudiced against her friends by proponent ; decedent told her she felt as if she was breaking up ; for several months prior to the summer of 1877 proponent and her son Julian were constantly with her, and on several occasions she found proponent reading letters to decedent, when she would immediately put them in her pocket, and change the conversation ; decedent became more and more infirm ; she did not live in the same house with proponent during any part of the year 1877, but proponent and her son were with her every day, especially after contestant left. After her death, proponent divided her effects, and in one of the drawers witness found decedent's papers and letters, and proposed to keep them, as they might be valuable, but proponent said "let us respect the letters of the dead—give them to me and I will burn them. When I die, I hope some one will perform the same charitable office for me ;" whereupon witness gave them to her ; witness never heard decedent speak of any other than the New York will, and learned that there was another from Mr. Cisco after her death ; she did not know of any friends of decedent in Europe, except Miss Stone, a grandniece, outside of members of her family, to whom she was accustomed to speak of her business affairs ; witness asked, after her sister's marriage, if she would not help to support witness, and she replied she could not, as she had to give so much to proponent, and to pay off her old debts.

On cross-examination, she testified that she could not

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say she was not on friendly terms with proponent ; that she had not seen her since she heard she was secretly and surreptitiously trying to defraud her mother out of her rights by a new will ; felt unfriendly to her for that reason ; in the winter of 1876-1877, witness's mother said to proponent that decedent was changing, breaking up, and that her memory was failing ; witness did not institute the contest, but, as soon as she heard of the will, she proposed to proponent that she should have three-fifths, and witness's mother two-fifths of the money left by decedent, and she supposed it had been accepted, before she received notice from the Surrogate of New York ; she did not think decedent was strong minded, or of good health, but was of very imperious disposition ; she relied upon the advice of Mr. Buckingham and proponent, in business affairs, and was always liberal to proponent, though exacting to others ; witness saw decedent nearly every day during the year 1877 ; she knew of decedent's feeble mind and unreasonable disposition from her conduct, and acts ; witness had had no intercourse with Julian Field, since his duplicity with regard to the will.

2. A letter of Mr. Cisco to Mrs. Clark, dated March 12, 1878, in which he acknowledges the receipt of letter of February 25, and states that decedent sent her will to him for safe keeping ; that, after decedent's death, he received a letter from proponent, which induced him to open the package then in his possession, when he found he was named as executor ; that he had concluded not to act, nor would Mr. Stone, who was substituted and who had been applied to, without examining the will ; that he wrote Julian Field of their declination, and recom-

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mended that his aunt and mother should decide upon an administrator, and he proceeds to give the provisions of the will, the current price of New York bonds, and that proponent and contestant should decide upon an administrator. He also stated that he would not advise contestant, as her husband was competent to do so, and requested Mrs. Clark to show his communication to her mother, and that it be considered confidential.

3. Another, dated April 9, 1878, from Mr. Cisco to Mrs. Clark, acknowledging receipt of hers of March 26, wherein he denied that decedent's will was made on his advice, as stated by Julian Field, and stated that she never asked his advice, and he never gave it; that proponent informed her that she was not otherwise provided for, but contestant was, and wished him to advise decedent, which he declined; that she subsequently wrote him that decedent was going to make a new will; and asked about its proper execution for probate in New York, and he gave her the information; that he knew nothing of the contents till it was opened, and he declined to act as executor, because there would be a contest, and he had written to proponent, advising a satisfactory compromise, in which case he would consent to act.

4. A letter from E. B. Washburne, dated April 11, 1878, to Mrs. Clark, acknowledging receipt of letter from her, and stating that he did not advise decedent as to her will, but referred her to the witnesses, if she desired them to act, and that decedent requested the witness Beisel to forward the will to Mr. Cisco.

5. Another, from Mr. Cisco to Mrs. Clark, dated May 1, 1878, acknowledging one from her of April 17,

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stating that she was entitled to a copy of the will, which he sent; that the last two letters of credit were payable to decedent or Mrs. Field, so the latter could draw the money, if decedent was unable to sign; that the instructions to decedent to destroy her first will were in her handwriting, and after her signature at the bottom of one of proponent's letters; that he had written to proponent, advising a compromise.

6. The deposition of Charles G. Clark, taken on commission, who testified that he knew proponent, contestant, and decedent, in 1877; that he was the husband of the witness, Julia T. Clark, who was a daughter of the contestant; knew Julian Field; that, after decedent's death, Mrs. Tucker returned to Geneva, and Julian soon after called upon witness to see his wife, and learn why her mother had refused to sign the paper sent from New York to admit the will to probate, saying it was done to save expense; and witness suggested to him that, as contestant was not in Paris, there was no immediate necessity of action, and they had better wait till Mr. Cisco was heard from; that Mr. Field said it was desirable the will should be speedily settled, and on witness asking him if the will was made in New York, he replied, "Yes;" witness requested his wife to write to her mother not to sign any paper, but write to Mr. Cisco for information as to the will, and that a reply came containing the will; that Julian informed him that, under the circumstances of the new will, it would be expected that a reasonable person would accept it, and that if contestant attempted to set it aside, he would make such revelations of the atrocious conduct of contestant towards decedent as would create a great scandal. On

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cross-examination, he testified he was on friendly terms with proponent and Julian ; that he could not say whether contestant would have acquiesced in the will, but for his advice and that of his wife.

7. The deposition of Mary Stone, taken on commission, who testified that she knew decedent since her childhood, and proponent and contestant ; was not on intimate terms with them ; she sometimes visited decedent, but not within the last two months of her life ; she conversed with decedent about her property, its disposition and her will ; she had two or three conversations in 1876, not later than the early part of November of that year, in Paris, at her residence ; that she asked witness as to the advisability of changing her will, stating, as her reasons, that proponent's and contestant's circumstances had altered since her first will, which divided her property equally, and she desired to change it, and give proponent more ; did not state details, but said contestant had an income, and proponent had none ; she understood decedent to say her will was in New York ; said nothing of one made in Paris ; she was always reasonable at that time, but she never spoke of having changed her will ; never spoke of proponent stating to her that Mr. Tucker had a large property ; that proponent was present at one of her interviews within the period named, at decedent's room, when the intended change of the will was spoken of by decedent, but proponent said she thought the New York will was unjust to her, which decedent assented to, or decedent said it was unjust, and Mrs. Field assented ; she never saw any indication of decedent's weakening mind or memory ; she did not see her in the summer of 1877.

8. The deposition of Mrs. Eliza L. Tucker, taken on commission, who testified that she resided at Geneva, was a sister of proponent and daughter of decedent, and was contestant herein ; that she resided with decedent in Paris continually, except in 1873, till June, 1877, when she went to Geneva, leaving decedent with proponent ; decedent was always kind and affectionate in her relations with witness, but not so much of a companion as proponent, owing to witness's deafness ; about two years before her death, proponent took personal charge of her ; when she was living with decedent, she did not know she had made a will in America ; was under the impression that she casually remarked that her property was equally divided between proponent and contestant in America, and that the will was left with Mr. Cisco ; decedent was easily excited by trivial causes, and would become so if dinner was not brought in at proper time, or her bath not ready ; such things would produce fits of weeping ; was frequently childish in her conduct ; when decedent first went to Europe, contestant sometimes wrote business letters ; afterwards her daughter did so, paid her bills and kept her accounts until 1875, when she married, after which proponent attended to her mother's business, signed checks, etc. ; she procured Mrs. Boulton and proponent to read her letters ; decedent always consulted proponent as to matters of business, and was much biased under her influence and advice ; it was well-known to the family that decedent had made her will in America ; never heard her express any dissatisfaction with it ; never had any conversation with her or proponent, or any one prior to decedent's death, respecting the instrument propounded ; her

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daughter wrote to Mr. Cisco, to inquire if there was a new will after the death of decedent, and after receiving a letter that there was, she wrote to witness at Geneva ; she received a letter from Julian referring to proponent ; he acted for his mother ; he called upon witness and showed her a letter from Mr. Cisco, and asked her to request Mr. Jackson to act with regard to the will, which she supposed was the old one, not having heard of the new ; proponent misrepresented witness to decedent, and made her think her income was larger than it was ; she had heard discussions between proponent and decedent about money matters, in which her mother always yielded ; and after she heard of the new will, she offered a fair compromise with proponent, which was refused ; Julian said that Mr. Cisco and Mr. Washburne and others advised his grandmother to change her will ; that witness stated that the decedent was afraid of proponent, and did not dare to contradict her.

On cross-examination, she testified she was on good terms with the proponent ; she was with decedent when she died ; that she was, and still is, the owner of a house in Twenty-third street, New York, unincumbered.

9. A letter addressed to contestant, without date, avenue Friedland, Paris, written by Julian, stating that decedent's will was her own idea, and justified in the eyes of all ; as, since the first one, Fanny's marriage, and his father's death, leaving his mother entirely dependent on decedent, had changed the circumstances and justified the change ; that it was the opinion that decedent left very little, and it remained for proponent and contestant to have the pittance settled according to law, and talk about matters afterwards ; after it was settled

she would be at liberty to take any exceptions she desired, to the details ; it was never too late to dispute a will ; it was a great thing to keep the money in the family ; and advised her to go before the United States consul with her husband, and to accept the will of her mother, as she knew decedent had acted according to the dictates of her conscience ; if she would forward such a statement to him, he would cable it to Mr. Cisco, and then send the document ; she knew as much about the new will as he or his mother did ; decedent had endeavored to make proponent and contestant equally comfortable, and given \$3,000 to Julia, to make up for the lost bond, which would, of course, come to contestant, as Julia was so well off ; that the details of the will were approved by Mary Stone, Mr. Cisco, and Mr. Washburne, who thought her decision and arrangement correct and best ; it was signed before Mr. Washburne, who had no possible interest in what she performed ; he could not remember the terms of the will ; on much reflection and advice he thought, if she would sign the document suggested, it would result in decedent's money remaining intact, instead of getting into the hands of New York lawyers, and if she did not, a commission would be sent out at an expense of \$250, there would be great delay, and the estate frittered away in fees and legal expenses ; not to take Boulton's advice, but George's, who had more common sense, and he would give his mother advice suited to the case ; asked her to sign the document to save expense and delay, saying that she would have time afterwards to discuss any clause or provision which she did not like, and that she should rely on decedent's justice, and should be unwill-

ing to call in question, or dispute, her last wishes, etc. Three other letters, from the same writer, of similar tenor, were read.

10. A letter from Mr. Buckingham, addressed to contestant, signed C. B., dated March 15, 1878, from New York, expressed his astonishment at the terms of the will, which he saw in Mr. Cisco's hands; stated that the will was safe in the latter's hands; that he had a new last will and testament of decedent; that proponent had written to two persons in this city to influence her mother to make a will, and make her income equal to contestant's, as an excuse for a change in the old; that he thought Mr. Cisco and Mr. Stone would act as executors, if they would agree to set the new will aside, and abide their arbitrament for an equal division of the estate, with reference to their respective pecuniary condition; that nothing could be done with the new will, because the executors refused to act, except by consent of the heirs, and that the contest would involve great expense and delay, and in the meantime the legatees could not draw anything to carry on litigation, or for support, except by order of court, and referred to the necessities of the proponent, which, with her sense of justice and kindred, should lead to a compromise of the will soon; that decedent's estate was \$45,000, in New York city seven per cent. bonds, worth twelve per cent. premium, and could be sold immediately; that the only deposit decedent left with Mr. Cisco was \$45,000 in United States bonds of 1862, and some \$3,000 or \$4,000 in money, which had been drawn out.

11. The deposition of Valerie Wright Forbes, taken on commission, who testified that she was the wife of

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Paul S. Forbes, who had been acquainted with decedent from 1871 to her death ; that decedent had always spoken of remaining in Paris, as her home, and she never expected to leave, and in her conversation always expressed her intention of remaining there for the rest of her life ; that her mind was perfectly clear, and health and spirits good.

On cross-examination, she testified that she was domiciled at rue Balzac, and she meant by domicil, where one had their home, where they had established their residence, with the intention of remaining ; decedent said her home was in Paris and in New York ; that was her general conversation, she could not specify particulars ; her exact words were that she "never expected to return to America, on account of economy, and liked it better ;" she never expressed a desire to return ; No. 4 rue Balzac was a family hotel, where the conversations took place, but she could not state the dates.

12. The deposition of Mrs. Julia T. Clark, taken under commission in Paris, who testified that she resided in Paris ; knew decedent, who was her grandmother, and lived at No. 4 rue Balzac from 1865 till her death, which was her home, domicil or residence ; she knew decedent to make Paris her permanent home, residence or domicil, and she told her she intended to live in Paris during her life-time ; witness went to America in 1874, and decedent told her to give her love to her friends and tell them she should never see them again, as she would never be able to go to America ; at another time, she told her to be sure to have her body sent to America, when she died ; she liked Paris better than any other place ; herself and family were all there, and her

health was better, and it was economical; her mind was good from 1865 to her death, and her spirits cheerful; she was in such bodily health as to stand a voyage, if she had desired to go to America, and had money enough to pay her expenses and return; and constantly expressed her intention to remain in Paris, as her home and domicile.

On cross-examination, she testified that she was not one of the contestants, but her mother was a contestant, and that witness would lose a legacy if the will was set aside; on several occasions when she urged decedent to go back to America, she said she should never go back, and asked witness to see her body placed in the family vault; witness did not see that her body was taken back to America, but its transportation was undertaken by her estate; decedent lived with witness's mother in New York before she went to Europe, and paid part of the expenses; she came to Europe in 1865 and 1866, and brought witness's sister Fanny with her; witness arrived in 1867; decedent never left Paris, winter or summer, except from August, 1870, to June, 1871; decedent was living in Paris and paid a portion of the rent; decedent went to Nice, and returned to Paris, and remained at rue Balzac, from the beginning of 1869 to her death in 1878; there was no break except that produced by the war, when she went to Le Mans and Trouville, accompanied by contestant and proponent and witness's sister, and returned to Paris, May or June, 1871; she desired the will to be broken, in the interest of her mother; decedent's remains were in the cemetery at New York.

13. The deposition of Henrietta N. La Romaine Meilbau, taken on commission, who testified that she resided

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at 4 rue Balzac ; was acquainted with decedent for nearly ten years ; who lived in her house at that time, but went with witness to Le Mans during the war, and conversed with decedent every day ; she said she should like to return to America to see her friends in America, but she was too old ; that decedent was always permanently established in France ; she was perfectly strong enough in body to stand a voyage if she chose ; said she liked France, and French people and manners, and that the climate agreed with her.

14. The deposition of Edward Harrison May, taken on commission in Paris, France, who testified that he knew decedent for twelve years ; he used to live in the same house with her ; often conversed with her about her former home, but not about any other ; that she died at No. 4 rue Balzac.

Proponent then read in evidence :

1. The deposition of Mrs. Mary L. Stone, taken on commission, who testified that she knew decedent all her lifetime, and was called upon by Mrs. Clark, last summer, to testify what she knew of decedent's intention in making her will, as to her competency ; and she testified that decedent was competent, but never told her what her intentions were ; that she spoke of her preference for America, and expressed her intention of returning.

2. The deposition of Mathilde Flandin, taken on commission, who testified that she resided in Paris, and knew decedent for twenty years, both in New York and Paris ; was very intimate with her, and conversed with her upon the subject of remaining in France, and she told her several times that she hoped she would not die

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in Europe ; she prayed she might not die there, but wished to go back to her native country.

On cross-examination, she testified that she considered her serious when she stated that.

3. The deposition of Albert C. Haseltine, taken on commission, who testified that he knew decedent from 1870 ; made her acquaintance in Paris ; decedent's party at Le Mans consisted of decedent, Mrs. Tucker, Miss Fanny, now Boulton, and afterwards joined by proponent at Trouville ; decedent frequently expressed the desire to return to America ; she seemed to be patriotic in an eminent degree, sometimes to an extent tiresome ; she did not like French people, detested them and their cookery.

4. The deposition of Edouard Clunet, who testified that he was a counselor of the Court of Appeals in Paris, and acquainted with the Civil Code of France ; that, in 1869, the court decided that a foreigner could not acquire a legal domicil in France, without the authorization of the Chief Executive, which opinion has not been changed. He instanced a Bavarian named Forge, who was brought to France at five years of age, served in the French army, married a French woman, established himself at Pau, and resided there until his death, and performed many possible civil and legal acts, practiced his profession, availed himself of electoral rights, and died at seventy-eight years of age. The court decided that he did not acquire a legal domicil, because he obtained no authorization, as required by article 13 ; that there had been no contrary decision since.

5. The deposition of Julian Field, taken on commission, who testified that he knew decedent, who was his

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grandmother ; he was proponent's son ; he called on Mr. Clark, contestant's son-in-law, after decedent's death, and conversed with him about the appointment of an administrator to her will, the executors having declined ; immediately after receiving a letter from Mr. Cisco, dated February 12, 1878, announcing that he declined to act, he called upon Mrs. Clark, by contestant's request, to advise as to what was best to be done ; he never attempted to mislead Mr. or Mrs. Clark, touching the nature or contents of the paper ; in March, 1878, he wrote contestant at Geneva, requesting her to sign an instrument of waiver, which had been received by his mother from her counsel in New York ; at that time contestant knew the nature and contents of the will, as appeared by her letters to proponent, dated March 17 and 28 ; the idea of making a new will was decedent's own, and the reasons were, first, that, by the death of witness's father, his mother was left destitute ; and, second, the marriage of contestant's youngest daughter to a man of means ; witness urged decedent to make her intentions known to contestant, but she absolutely refused, alleging that if she did she would be subjected to violence, abuse, worry, and trouble ; decedent told witness what she intended doing by her will—what she thought her duty ; having once made up her mind, nothing would prevent her from acting in accordance with her decision ; on February 24, 1878, he called upon contestant, and showed a letter from Mr. Cisco, dated February 12, 1878, and she referred him to her daughter, Mrs. Clark, and he went to see her, and gave her a letter stating that his object was to consult as to the propriety of asking contestant to agree with his mother as to the appointment of an administrator ; no

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paper was offered to contestant for her signature at that time ; Mrs. Clark wrote to Mr. Cisco for information as to contestant's will, who replied, giving the information ; at that interview, Mrs. Clark requested that Mr. Cisco should be asked to name a suitable person, for that purpose ; subsequently, in conversation with Mr. Clark, the latter spoke of the intention of his wife to contest the will in her mother's name, and that it had better come to a compromise ; afterwards, he called on Mrs. Clark, and asked the grounds upon which she proposed to contest ; she said, undue influence, but laughed, and said she should never have dreamed of such an absurd and hopeless charge as incapacity, against her grandmother ; he only saw decedent twice, between Mrs. Clark's marriage and decedent's death ; on the first occasion she was clear, strong in intellect, and remarked, after she entered the room, that she could not tell how glad she was that the alteration she made in the will was just and right before Julia's engagement—that she was glad she made it when she was strong and could get about, now that Julia had married a man who could provide for her—that she was not equal to going out very much—the thought that she had not altered the will she made in America would worry her to death—that Eliza had then no one dependent on her, except George, who could take care of himself, if he liked, and she had quite enough money to live quietly and comfortably if she liked ; she often repeated that she was glad that she had altered her will ; the next time he saw her was a week before she died.

On cross-examination, he testified that he was in the habit of visiting decedent two or three times a week,

more or less ; this conversation took place in Mrs. Clark's drawing-room in Paris, where he presented Mr. Cisco's letter, telling her that he had been asked to do so, by her mother, to whom he had submitted it, and asked Mrs. Clark who she thought would be best to suggest as executor ; she said that it had better be left to Mr. Cisco, and they both agreed that proponent and contestant would accept any executor named by him ; Mr. Clark concurred in his wife's suggestion, and said it was necessary for proponent and contestant to waive the rights of administration in order to allow of any one administering the estate, other than the executor named in the will ; Mr. Clark said, " I suppose the will was made in America, was it not ? " witness answered, " I suppose so ; " he sent one of the waivers, sent by counsel to his mother, to contestant ; he had a conversation with decedent about making a new will ; the idea originated with decedent ; she laid the circumstances which induced her to arrive at that conclusion before him, and asked his opinion ; about a year before her death, he told her that he thought she was right ; he never made any suggestion, as to leaving more to his mother than by the will in America, for the purpose of making her income equal to contestant's, so as to make them both equal ; he only concurred with her suggestion ; he knew decedent left a will in America, but not exactly the terms ; and he knew she made a will in Paris, the same evening, or the day after ; he remembered, after decedent's funeral, he and Mr. Clark were collecting some articles left by her, and they came across some of her letters, which he took, and said he would burn ; that there was a mass of papers,

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bills, letters, of no interest, and he burned them, two or three days after the funeral

6. A letter from Mr. Cisco, dated February 12, 1878, addressed to the witness, Field, stating that he examined the will, and to his surprise found that he was appointed executor, and that both he and Mr. Stone declined to act; and suggested an agreement between the parties upon an administrator, and that the letter be exhibited to his mother.

7. Two letters from C. Buckingham to decedent, dated in 1868 and 1871, respectively, the former of which contained the following passage, "You speak of your age and infirmities, and your desire to return to the land of your nativity," but he did not see the way clear for her return, and did not know where she could go for lodging, and advised her to remain where she was comfortable and free from irritation.

8. The deposition of Mrs. Julia M. Field, proponent, taken on commission, who testified that decedent was her mother, and contestant her sister; witness and contestant were the only surviving children; decedent lived from 1877 to the time of her death in Paris; left America, where she was born, in 1866; she lived with decedent the latter part of 1871; she lived on the ground floor, while decedent lived on the second, where she was entirely independent of witness; in 1877 she possessed nothing, was dependent on her mother, and had been since her husband's death in January, 1875; her financial condition was known to contestant and decedent; decedent's mind and memory were strong and clear in June and July, 1877; she was perfectly well, and her mental capacity as strong as ever; she was noted for her

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clear memory and power of mind, which were marvelous for a woman of her age ; she was well known for her firmness of will and character ; nothing could change her determination, after she had reached a conclusion that she thought right ; witness never attempted to exercise influence over her, never discovered any indication of failing mind or memory ; she was present at the wedding of Miss Tucker, in the early part of January, 1878, about ten days before her death, and appeared quite vigorous in body and mind ; she observed only such emotions as were common to her on such occasions ; she told witness that she was going to execute her will ; witness went with decedent to the American legation, and left her in the private office of Mr. Washburne ; after its execution, witness walked home with her ; she said she was glad the business was done ; she always acted independently ; witness had been on good terms with contestant until this contest began ; she never misrepresented her sister's means ; decedent claimed to be a citizen of the United States and not otherwise, and used to say she was a true-born American ; on July 4, about two years before her death, she said she had a mind to introduce herself as the oldest American lady in Paris, at Mr. Helmbold's, who had invited the Americans in Paris to a free lunch ; she never failed to celebrate Washington's birth-day and the fourth of July, reciting the song of the "Star-Spangled Banner ;" she never declared to the authorities in Paris her intention of residing there ; never procured an authorization, or took any steps to renounce her American citizenship ; repeatedly manifested a desire to return to America, and every winter threatened to return the following spring ; she detested France and the French,

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and made them promise that, if she died, they would send her home; about a year and a half before her death she purchased a trunk, and had it marked with her initials and "N. Y.;" witness authorized Julian to communicate with contestant as to the waiver of administration; the paper sent to her was the same as sent to witness; decedent had given more during her life to contestant and her children than to proponent and hers, and the idea of changing her will originated with her, for the reason that witness's husband had died, leaving her penniless; contestant's youngest daughter had married well, and did not need assistance; she consulted friends upon the subject, and requested Mr. Davidge to see her in reference to the matter; when she had decided to make a new will, she requested Mr. Davidge, the lawyer, to come and see her in reference to it, and he did so, and they talked the matter over in decedent's sitting-room; witness learned this from decedent, as she was never present at any of their interviews; but on one occasion contestant's son George came into the room, and decedent asked him some question about his mother's income; he said he didn't know exactly, and asked her what she wanted to know for, and if it was about her new will? She answered it was; decedent told her, after its execution, that she did not communicate its contents to contestant, because she would not be satisfied and would give her no peace.

On cross-examination, she testified that she had been dependent on decedent since her husband's death, and remained so until decedent's death; her husband died in January, 1875, and thereafter decedent began to consider the making of a new will; spoke of it frequently,

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and of her desire to equalize witness's income with that of contestant; witness wrote to Mr. Cisco and Mr. Buckingham in the winter of 1876, or summer of 1877, that, in view of her altered circumstances by the death of her husband, a new disposition should be made, equalizing her fortune with contestant's; that she did not know the terms of the then will, but supposed it in favor of her sister, as witness's husband was in receipt of a handsome income; and she spoke to Miss Stone and Mr. Hawkes about a new will being made, but did not ask them to exert influence upon her mother; she had frequent conversations with decedent about her will, but could not give dates; she approved of her mother's idea, and deemed it best; she received a visit from Mr. Washburne, in answer to a letter, and her mother executed the will the next day; decedent referred to a will left with Mr. Cisco, but she knew nothing of its contents; she did not write Mr. Cisco, at her mother's dictation, to destroy that will; she never kept decedent's accounts, but wrote letters for her from 1875, to the summer of 1877; she wrote to Mr. Buckingham to find out what contestant's income was, at decedent's request, and letters were handed to decedent which contained all the information which witness had as to her means; she could not specify the time when decedent expressed an intention to return to the United States; she never authorized any one to communicate with decedent with reference to any other matter connected with the will; decedent first went to Europe in the thirties and remained about four years, then returned, and again went to Europe in 1844, remaining a year and a half, and returned; then went to Europe in 1866, where she died; she traveled from place to place,

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always lived in hotels, or *pensions*, wintered at Nice, summered at Baden, and in 1870 and 1871 at Trouville; since then remained in Paris at No. 4 rue Balzac, for the last eight or nine years; witness's father died in 1864; decedent brought her youngest niece, and her sister followed with her eldest daughter; witness had been in Europe with her since, and contestant's family lived in Europe; that witness had two sons in America.

9. Two letters from contestant to proponent, the former stating that she had received a letter from America that decedent had altered her former will, and made a new one, dividing her property unequally, giving the major part to proponent, and that if so she was rejoiced to hear it, as it was right, because her husband had left her without means, etc.; and the latter stating that if decedent had made her will equal, it was her intention to make some allowance to proponent from her estate, but she received a letter from America informing her of the new will, in which almost the whole property was given to her, amounting to about \$37,000, leaving witness the paltry sum of \$4,500, and refusing to accept it, as unjust, and that she should demand to know the circumstances under which it was made; and advised her not to oblige her to resort to legal measures, and that the only will she would recognize was that left in America.

10. The deposition of Albert C. Haseltine, taken on commission, who testified that he knew decedent and was in the habit of visiting her in 1877 every week or two; she was thoroughly American, an enthusiastic admirer of the institutions of the United States, and declared her home to be there; she detested the French, especially their cooking; expressed a strong desire to return to

America, and was only prevented by questions of economy, and the impossibility of going at her advanced age, without being accompanied by some member of her family, all of whom preferred remaining; at one time she expressed a determination to go alone; he was intimate with her in 1870 at Le Mans; that in 1870 he found her possessed of mental acuteness, and independence of character, and sterling common sense, the same as he recognized in 1879,—a perfectly sound mind, as he judged from her language and demeanor; an attempt to influence would have had a contrary result to its design, but she depended on proponent entirely for a quantity of services, necessary for a person of her age; she spoke of her devotion; proponent was entirely dependent on her mother, whilst the contestant had means; and that decedent had gone to the American legation to have her will certified.

On cross-examination, he testified that in September or October, 1870, at Le Mans, she expressed regret that she was not able to return to America.

11. A certificate from the French Minister of Justice that no declaration of intention on the part of decedent, desiring to be domiciled in France, was ever made.

12. Charles A. Jackson, sworn for proponent, testified that he was proponent's counsel, and knew decedent in her life-time; saw her twice in Paris between July 17 and 25, 1877; she appeared robust in health, and surprisingly bright in her ideas and manner of expression; in her conversation, she expressed herself more intensely American than any woman he had ever met.

On cross-examination, he testified that she spoke of this country as hers, and her desire to return; said her

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absence was caused by her inability to cross the Atlantic, being an aged person, without pain and inconvenience, and because she lived more cheaply abroad ; said it was her desire and intention to return ; that New York was her home—that her friends were there—that she would be buried there ; that she was a person of extremely imperious will.

13. Hickson W. Field, sworn for proponent, testified that he was a son of proponent, and grandson of decedent ; last saw decedent in August, 1872, at 4 rue Balzac, who expressed regret that he was to return so soon, as she would have been glad to have come with him, as she did not wish to die in a foreign land, and that she frequently expressed that wish, and said she thought she should come in the Spring ; that the reason she gave for not coming with him, was that the time was too short for preparation, and to secure a state-room ; that he had received three letters from his grandmother, which were given in evidence ; that decedent left property in this country, consisting of library, paintings, clothing, furniture, and articles of jewelry and silverware stored, though originally left in Twenty-third street ; they were articles she had used in her household ; that he was in Paris about a month.

On cross-examination, he testified as to when the letters given in evidence were received ; that decedent had resided about six years in Paris ; that he conversed with her in the month of August, 1872, as stated on direct ; that he reached Paris in June, went on business, and for his health ; saw decedent every day while he was in Paris in June ; witness's mother was also residing there ; that he was there about a month that time,

then went to Vichy, and remained three weeks, and returned to Paris, from thence to London and Liverpool, and home.

On re-direct examination, he testified that when he came over he engaged his passage back, having a certificate entitling him to a return passage ; the ship was full.

14. Monsell P. Field, sworn for proponent, testified that he was a brother of the last witness, and a grandson of the decedent ; that he occasionally corresponded with his grandmother, during the last years of her life, and received the latest letter in January, 1876 ; saw her last in April, 1865, in America ; he was in the United States Navy ; resigned in 1872 ; he had searched for the letters but he could not find any of them ; the subject of her last letter was relative to some of the silver-ware ; he had had one or two letters before, in relation to it, and that she spoke of New York as her home, and he thought she did in every letter she wrote, from 1865 down to that date, express a wish and desire to return, and dread of dying abroad ; the letter contained a list of the articles ; witness carried the letter in his pocket for some time, in the endeavor to find the articles.

On cross-examination, he testified that he showed the letter to his brother shortly after its receipt, and inquired of him as to the articles ; that letter was received in January, 1876, which was the last communication from decedent.

15. In one of the letters by decedent to Hickson Field, of December 20, supposed to be 1869 or 1870, she stated that she would not allow his mother to starve ; that she had given her 2,000 francs, besides paying for

her dinners and little things, not as a loan, but as a gift ; that she was economical for herself, stating the amount she had spent ; that the expenses of board were extra, much higher than before, and that contestant would not pay anything for her part ; that she should do the best she could for her children and grandchildren ; that she felt proud of the boys, and hoped they would make their way in the world.

16. Another, of May 30, 1870, in which she said that she could get more for her money there than at home, but did not wish to die out there ; she might drop off at any time, and that she did not like to leave his mother there alone.

17. Another, of date July 21, 1870, speaking of his removal from his office ; that his grandmother had things stored, among other things, silver articles, such as dishes and covers, two large wine-coolers, which she lent her daughter when she was at Washington ; that she had lent some hundreds of francs ; that she hoped, when she returned, if she found a little house, she should have some of her grandchildren and their mother with her ; she would come home, but feared she would not be able to live in New York, it was so dear.

18. There was also given in evidence a translation from the laws of France, " of the enjoyment and privation of civil rights," enacted March 8, 1803, promulgated the 18th of the same month. The 13th clause or section provides that a foreigner who shall be allowed by authorization of the emperor to establish his domicile in France, shall therein enjoy all civil rights as long as he shall continue to reside there.

Also, the 5th chapter, " of testamentary disposi-

tions," in which, section 967 provides that everybody may dispose of property by will, whether under the form of instituting an heir, or under the form of legacy, or any form appropriate for manifesting his will ; section 968 provides that no will can be made in the same document by two or more persons, whether for the benefit of a third person, or reciprocal or mutual disposition of their property ; section 969, that a will may be holographic, or by public att, or in form mystic ; section 973, that the will must be signed by the testator ; and if he cannot sign, express mention thereof must be stated in the will and the cause which prevents his signing ; section 974, that it must be signed by the witnesses ; section 980, that witnesses called to be present at the execution of wills must be males of full age, and subjects of the empire, enjoying civil rights.

Considerable testimony and documentary evidence was adduced by the parties, in addition to the above, but the same is sufficiently referred to in the opinion.

JACKSON & MARTINE, *for proponent.*

MILLER & PECKHAM, *for contestant.*

THE SURROGATE.—[After stating the testimony.]—The questions raised, and necessary for consideration, in this case, are :

1st. Whether the decedent at her death was domiciled in New York or in France.

2d. Whether the instrument propounded was executed by the decedent free from restraint.

The testimony which is claimed by contestant to establish a domicile in Paris, is substantially the recita-

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tion in the will, stating that decedent was late of the State and city of New York, then residing in Paris:—the testimony of Mrs. Tucker, that decedent resided in Paris, and died there:—that of Mrs. Forbes, that decedent had always spoken of remaining in Paris, as her home, never expected to leave, and intended to remain there the rest of her life; that her exact words were that she never expected to return to America, on account of economy:—that of Mrs. Clark, that, in 1874, when she went to America, decedent told her to tell her friends there she should never see them again, as she would never be able to go to America; and that at another time she requested her to be sure to have her body sent to America when she died; that she liked Paris better than any other place; that her family were all there, and her health was better; that decedent went to Europe in 1865 or 1866; never left Paris, winter or summer, except August, 1870, to June, 1871; that she remained in Paris from 1869 to her death in 1878, except her absence in consequence of the war:—that of Henrietta Meilhau, that she conversed with decedent when she went to Le Mans, which must have been about 1870, and said she would like to return to America to see her friends, but was too old, and said that she liked France and French people, and manners, and the climate agreed with her:—that of Mr. May, that he often conversed with decedent, about her former home:—that of Mr. Riggs, that he had often conversed with decedent about investments, and several times she remarked to him, that she never intended to return to this country, because she knew what it cost there, and did not know what it cost here.

The facts and circumstances which are claimed by proponent to establish the continuance of decedent's domicile in New York are that of the witness Mrs. Stone, that decedent spoke of her preference for America, and expressed her intention of returning:—that of Mathilde Flandin, that she had conversed with decedent upon the subject of remaining in France; she told her several times, she hoped she would not die in Europe, and prayed that she might be able to go to her native country:—that of Mr. Haseltine, that, from 1870 to her death, he knew decedent, and that she frequently expressed a desire to return to America, and did not like the French people:—that of proponent, that decedent claimed to be a citizen of the United States, as late as July 4th, two years before her death; repeatedly manifested a desire to return to America, and threatened every winter to do so, next spring; that she detested France, and made them promise to send her remains home; and that about a year before her death, she purchased a trunk, had it marked with her initials, and “N. Y.,” but she could not specify the times when decedent expressed her intention to return to the United States; that she always lived in hotels or boarding-houses, but had remained at 4 rue Balzac since 1871:—that of Mr. Haseltine, on his second examination, that decedent declared her home to be America, and expressed a strong desire to return, and said she was only prevented from motives of economy, and she could not go at her advanced age, without being accompanied by some member of her family; and on one occasion she expressed her determination of going there alone; and when asked on cross-examination to specify dates, he stated only September or October, 1870, at Le

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Mans :—that of Mr. Jackson, who testified that he saw decedent in Paris between the 17th and 25th of July, 1877; that she expressed her desire to return to this country, and that her failure to do so was occasioned by her inability to cross the Atlantic, and she lived more economically abroad; and said it was her desire and intention to return, that New York was her home, that her friends were there, and that she would be buried there:—that of Hickson W. Field, her grandson, that he last saw her in August, 1872, in Paris, when she expressed her regret that he was going so soon; that she would have been glad to have gone with him, as she did not wish to die in a foreign land, and she frequently expressed that wish, and said she thought she should come in the spring:—that of Monsell B. Field, who testified that he received letters from decedent from 1865, in which she spoke of New York as her home, and dread of dying abroad; that he received one letter containing a list of certain articles, belonging to her, in New York, which he received in January, 1876, being the last communication from her, in which she spoke of New York as her home, and her dread of dying in a foreign land:—also a letter to Hickson Field, dated July 31st, 1870, in which she expressed the hope that, when she returned, she would find a little house, and have some of her grandchildren and their mother with her; that she would come home, but was afraid she would not be able to live in New York, it was so dear; which embraces all the testimony directly bearing upon that question, except certain references by Mr. Buckingham in two of his letters to her, referring to her expressed desire to return.

It is true that the witnesses upon this subject are

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not very definite in respect to times, when those various expressions of desire or intention were made, and that such expressions, several years before her death, if followed by contrary expressions in her later years, would be consistent with her changed purpose, in respect to the abandonment of her domicile of origin in New York ; but there seems to be, in the evidence of Mr. Haseltine and in the letter received by Monsell B. Field, in July, 1876, although the letter could not be produced, strong evidence that she regarded New York as her domicile, and had not intended to establish a domicile in Paris. But another circumstance which I think adds quite materially to that conclusion, is the fact that she went to the American legation and executed the will in strict conformity to the requirements of the statutes of New York ; and in a doubtful case, it seems to me that this circumstance is full of significance ; that she recognized the fact that her estate was to be administered under that will, according to the laws of the State of New York ; otherwise, it must have been known that it was void for any purpose, because not executed in conformity to the laws of France.

I do not regard the recitation in the will, "late of the city and State of New York, in the United States of America, now residing in the city of Paris," as controlling, when taken in connection with the other facts of the case, because the term residing, in common parlance, is used, as signifying a sojourning or present stay.

In *Dupuy v. Wurtz* (53 *N. Y.*, 556), it was held that the execution of a will of personal property depended upon the law of the place where the testator was domiciled at the time of his death, and that for the purpose of succession every person must have a domicile, and but

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one, and that the domicil of origin would be presumed to continue until a new one was acquired ; and that, to effect a change of domicil, there must not only be change of residence, but the intention to abandon the former domicil, and acquire another as a sole domicil ; hence, under the authority of that case, as well as others, it is apparent that the party alleging a change of the domicil of origin holds the burden of proof, and must give satisfactory evidence of a change, and I am of the opinion that the evidence, in this case, is not such as should satisfy the court of an intention to abandon the domicil of origin. But if, according to our law, the expressions of intention indicate a purpose to abandon the domicil of origin, and reside in Paris, with the intention of remaining there permanently, it seems to me an insuperable obstacle to the establishment of a domicil in Paris, found in section 13 of chapter 1 of the Code Napoleon, which reads that a foreigner, who shall have been allowed, by the authority of the emperor, to establish his domicil in France, shall enjoy therein all civil rights, so long as he shall continue to reside there ; using the terms “domicil” and “residence,” as of different signification ; and while I might feel inclined to concur with the learned counsel for the contestant, in his interpretation of the signification of those provisions, unaided by evidence of judicial determination by the courts of France, I am constrained to hold that the testimony of Edouard Clunet, a lawyer of Paris, sufficiently shows that the highest court of France has put a judicial construction upon this section, which holds, substantially, that without such authority the decedent could not become domiciled in France ; and if I correctly understand

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his testimony, this was in a case much stronger than the present, where the question of the administration of decedent's estate was involved, especially as his testimony is in no way controverted.

I am also confirmed in this opinion by the case of Dupuy v. Wurtz, above cited, for there the learned judge, after an elaborate review of all the decisions of the courts of France upon that subject, reached the same conclusion as to the result of the final adjudication of the court of cassation. I am, therefore, of the opinion that decedent died domiciled in the city of New York, and not in Paris; and that in that respect the will was properly executed, conformably to our law, and valid.

I had occasion to consider a kindred question in Von Hoffman v. Ward (4 Redf., 244).

The next and final question upon which I am called to pass, is whether the evidence warrants the finding that the will in question was executed under restraint, or undue influence, and, bearing upon this question, it is important to understand the mental condition of the decedent at the time of its execution.

It is, perhaps, safe to presume that a lady eighty years of age did not enjoy the same mental vigor that she did in early life, but the preponderance of the testimony, taken in conjunction with the evidence of the subscribing witnesses, in the absence of that of Mr. Washburne, and the attorney who drew the instrument, and who must have known her mental condition, establishes, to my mind, the fact that decedent was of vigorous intellect and clear understanding, and a woman of rather remarkable independent opinions and will.

Without further reference to the testimony upon that

subject, it is sufficient to say that it clearly shows an interested motive on the part of the proponent to procure a change of the former will, which equally divided decedent's estate between proponent and contestant, her daughters, and it is equally clear that her declarations and letters, and the somewhat exuberant advocacy of a change in behalf of his mother by Julian Field, and the conversations between her and decedent upon the subject, indicate the capability on her part to influence decedent in that change. It also appears that she had ample opportunities, being in constant intercourse with her mother, to exercise that influence, but it is proper to say that a very material change in the relative pecuniary condition of the sisters occurred subsequent to the execution of the former will, and that even the contestant recognized that fact, and the propriety of her mother doing so; also that the various facts and arguments which she urged upon her mother, and endeavored to procure Mr. Cisco and Mr. Buckingham to present to her without success, appear to have been substantially true, and hence it cannot be found from the evidence that any untrue representations were made by her, to her mother, in that regard.

In *Deas v. Wandell* (59 *N. Y.*, 636), it was held that the mere fact that a will gave all decedent's property to persons not related to the testator did not raise the presumption of want of mental capacity or undue influence.

In *Seguine v. Seguine* (3 *Keyes*, 663), it was held that the doctrine of an inofficious document had no place in our law; that if a testator seems to have had testamentary capacity, when under no undue influence, he may dispose

of his property as he pleases, however absurd such disposition may be.

In *Cudney v. Cudney* (68 *N. Y.*, 148), it was held that, to invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred, and that it was not sufficient to show that the party benefited by a will had the motive and opportunity to exert such influence, but that there must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by fraud, or other improper means, that the instrument is not really the will of the testator. See *Booth v. Kitchen* (3 *Redf.*, 52); *Mairs v. Freeman* (*Id.*, 181); *La Bau v. Vanderbilt* (*Id.*, 384).

• It appears that decedent and proponent conversed upon the subject of the injustice of the will made and left in New York, in respect to the changed condition of the daughters, and that the decedent recognized and admitted the fact; and the testimony of Mary Stone, taken in behalf of the contestant, shows that in 1876, in a conversation, she asked witness as to the advisability of changing her will, and stated as a reason that the circumstances of her daughters had altered since her first will, and that she desired to change it, and give proponent more; observing that contestant had an income and proponent none.

The decedent, in her will, in the residuary clause, which divides the remainder of her property equally between her daughters, states that they are equally dear to her, and any apparent disparity in the amounts provided for them arose from the fact that Mrs. Tucker had

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theretofore received from the estate of her late father more largely than Mrs. Field ; and from the fact that Mrs. Tucker was and is possessed of property yielding an income adequate to her maintenance and support, and Mrs. Field would be left destitute, but for the provisions made for her benefit.

The reasons thus stated seem to concur with those expressed to Mrs. Stone, and if they were suggested to her by proponent, they seem to have been reasons which commended themselves to decedent, and there is nothing in this case which shows that the facts stated by proponent and by decedent in her will, were not true.

Redfield, in his *Treatise on Wills*, vol. 1, p. 525, says : " We do not suppose that if the testator is capable of making a valid will, when left to himself, his testamentary act is to be rendered nugatory by the honest importunity of a wife, to obtain only what she deems her fair share of his estate, and which only prevails to that extent ; although it could be shown that, without such importunity, the testator would have given her much less. And the same may be said of other relations fairly entitled to the testator's bounty. And although it may be justly said that good faith is no fair criterion of justice and propriety in the measure of the importunity of solicitors for testamentary bounty, yet if the importunity is only to the extent of justice and propriety, its results, to that extent, can scarcely be condemned, because their author would gladly have carried them beyond that limit."

In other words, the considerations addressed to the intelligence and good feeling of a testator, which leave him still to his independent choice, or which influence

his better judgment, cannot be regarded as undue, to the extent of affecting the validity of the testamentary act ; and this seems to be fully sustained by the court of appeals, in *Children's Aid Society v. Loveridge* (70 *N. Y.*, 387). Judge MILLER, at page 394, uses this language : " It (the influence) must not be the prompting of affection ; the desire of gratifying the wishes of another ; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices ; but a coercion produced by importunity, or by a silent, resistless power which a strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear." And in *La Bau v. Vanderbilt* (3 *Redf.*, 384), it was held that influence or importunity which would avoid a will, must be such as to deprive the testator, at the time, of the free exercise of his will, whereby the instrument became the will of another mind, rather than that of the testator, and such undue influence must be proved, and will not be inferred from opportunity and interest,—citing several authorities.

I have not deemed it necessary to consider the extraordinary anxiety in respect to the proposed change of decedent's will manifested by the proponent, or the officious advocacy of its justice by Julian Field, except so far as they seem to bear upon the question of the actual exercise of undue influence upon the decedent, because they are matters of taste and propriety, as to which it is possible, though not probable, that there may be a difference of opinion.

I am of the opinion that the relations of the parties, and the terms of the will, are not such as to raise any

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presumption of undue influence, nor any suspicion which has not been satisfactorily explained by the proponent, and that, therefore, no presumption can be indulged in, against the good faith of the transaction. I am also of the opinion that the testimony, when properly weighed, is not sufficient to justify the conclusion that there was any undue influence exercised by proponent upon the mind of the testatrix, which overcame her independent will in the making of the instrument, and that for those reasons, the paper offered should be admitted to probate, as executed conformably to the laws of this State, by decedent, when she was of sound and disposing mind, free from restraint, and domiciled in this State at her decease.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURREGATE—
April, 1881.

PEARSALL v. ELMER.

*In the matter of the probate of a paper propounded as a
codicil to the last will of SAMUEL WOOD, deceased.*

Upon the hearing of a contested application for the probate of a codicil to a will, a witness, who was an attorney, was asked by contestants to state a conversation had between him and decedent, relating to the preparation by him, for decedent, of a codicil not executed, subsequently to the execution of the instrument propounded. *Held*, privileged, under Code Civ. Pro., § 835, and excluded.

It seems, that the rule would be otherwise, as to conversations, etc., relating to the paper presented for probate.

The protection, afforded to a client by the section of the Code cited, does

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not cease with his death, but may be invoked by his executor, on proceedings for probate, before admission of the will.

In the interpretation of a statute, it is the duty of the court to consider the object of its enactment, and the mischief which would result from a literal construction.

Staunton v. Parker, 19 Hun, 55,—criticised.

THIS was a hearing of an objection to the admission of testimony upon an application for probate of a codicil to a will.

Benjamin F. Blair, an attorney, a witness called for contestants Sylvester W. Pearsall and others, having testified that, some time in 1875, subsequently to the execution of the codicil offered for probate, he called, by appointment, upon decedent, in reference to the preparation of a new codicil to his will, not executed, was asked to state a conversation which then occurred between him and decedent on that subject. This testimony was objected to by counsel for the opposing party, William Elmer, named as executor in the codicil propounded, as a communication made by decedent, as witness's client, in the course of his professional employment, and inadmissible under Code Civ. Pro., § 835.

JOSEPH H. CHOATE, *for objector.*

WILLIAM FULLERTON, *opposed.*

THE SURROGATE.—In *Allen v. Public Administrator* (1 Brad., 221), Judge BRADFORD held that the provision of the Revised Statutes, that a physician should not be allowed to disclose any information which he had acquired in attending any patient in a professional character, which information was necessary to enable him to prescribe for such patient, was not applicable to the physician of a deceased person in a testamentary case,

concerning the probate of the will of such decedent ; that the prohibition was a personal privilege to the party, which might be waived, and that, if such privilege did not die with the party, still, before administration in a testamentary proceeding, there was no one competent to assert the privilege in exclusion of testimony necessary to the determination of what constitutes the last will and testament of the deceased. On appeal to the court of appeals, the decision of the Surrogate, as to the validity of the will, was sustained, and his able opinion contained in the case fully concurred in (*Selden's Notes*, 93).

In *Whiting v. Barney* (30 *N. Y.*, 330), after a careful consideration of the authorities, and the reason of the rule, it was held, that the rule which protects the professional communications of clients to their attorneys or counsel, from disclosure, could only be held to extend to such communications as had relation to some suit or other judicial proceeding, either existing or anticipated ; and that when both parties were present, when the communication was made by one to his attorney, there was nothing confidential in the communication ; and the cases, holding that any communications by a client to his attorney, though they did not relate to existing or prospective judicial proceedings, were privileged, were considered by the court in that case, and disapproved. In *Hebbard v. Haughian* (70 *N. Y.*, 54), it was held that an attorney employed to draw a deed was competent to testify to the directions received by him from the parties, as to the transaction between them at the time, as they were not communicated to him as an attorney, to enable him to perform his duties to the client. See *Coveney v. Tannahill*, 1 *Hill*, 33.

It will be observed that the section now existing forbids the disclosure of a communication made by a client to his attorney, or his advice given thereon in the course of his professional employment; and I am of the opinion that the prohibition is broad enough to cover all cases of professional employment, without regard to the question whether that employment related to some suit or other judicial proceeding, either existing or anticipated, as limited by the court of appeals, in *Whiting v. Barney*, above cited. In *Dilleber v. Home Life Ins. Co.* (69 *N. Y.*, 256), it was held that information as to the condition of the insured, acquired by a physician while attending upon him, which was necessary to enable the physician to prescribe, was prohibited by the statute referred to. In *Edington v. Mutual Life Ins. Co.* (67 *N. Y.*, 185), upon which the latter case was decided, the same principle was held, and the prohibition was adjudged to include such knowledge as the physician acquired from the patient, from statements of others present at the time, or from his own observation of the patient's symptoms and appearance, and that it would be presumed, from the relationship of the parties, that the information so imparted was given or obtained for the purpose of enabling the physician to prescribe for the patient, and so that it was material. Judge MILLER reviews the case of *Allen v. Public Administrator*, above cited, and its affirmance in the court of appeals, and says: "Although the case was heard in the court of appeals, it does not appear that the point first decided was considered and determined;" and the same judge uses this language: "How far the distinction may be held to exist, where the question arises upon the probate of a will, and a case

where an assignee has acquired a right, it is not necessary to determine at this time ; but the general rule is well settled, that the protection which the law gives to communications made in professional confidence, does not cease upon the death of the party. The seal which the law fixes upon such communications remains, unless removed by the party himself or by his legal representative."

In *Pierson v. People* (18 *Hun*, 239), Pierson was indicted with Mrs. Withey, for poisoning the latter's husband, and on the trial the physician who had attended the husband in his professional capacity, after the poisoning, was questioned by the counsel for the people as to the symptoms of the deceased, and as to what he had learned concerning his condition, while attending him ; this was objected to as privileged ; the objection was overruled, and on appeal the ruling was sustained, the decision being put upon the ground that there was no party living that could claim to represent the deceased, in relation to the subject-matter, unless it were the people, and that the statute was intended to protect the patient, and not to shield one charged with murder.

In *Staunton v. Parker* (19 *Hun*, 55), on the probate of a second codicil to testator's will, appointing one Parker executor, contestants called a physician who had attended the deceased for eight years previous to his decease, to show that he was incompetent when he executed the codicil. The physician stated that all his knowledge was obtained from what he had observed while attending him professionally. The Surrogate rejected the testimony, but the General Term in the Monroe District held this was error, and Judge TALCOTT in his opinion stated that,

the patient being dead, the provisions of the section could only be waived by his representative, and that Parker, when it was excluded, was a mere stranger to the estate, and that the heirs-at-law, who offered the testimony, who appeared then to be the only representatives of the deceased in the premises, and succeeded to the rights of the deceased, were competent to waive the provisions of the act. It seems to me impossible to reconcile this decision with that of *Edington v. Mutual Life Ins. Co.*, and *Dilleber v. Home Life Ins. Co.*, above cited. The executor named in a will, before receiving letters, may dispose of sufficient of the estate to pay funeral charges, and may take the necessary steps for the preservation of the estate (2 R. S., 71, § 16). Judge WILLARD well says that, "though the power of the executor before probate is now greatly restricted from that at common law, yet in many respects the probate when granted is said to have relation to the time of the testator's death" (*Willard on Executors*, 147). If the prohibition of the statute is not waived by the death of the client, but may be raised in behalf of an assignee, it would seem to follow that all persons succeeding to the rights of the client might avail themselves of the prohibition.

Suppose a testator's will to be probated, then clearly the devisees and legatees, as well as the executors representing them, would be entitled to object to such disclosure, for the purpose of protecting their title, as well as an assignee. Indeed, is it not quite obvious that, if a client is only to be protected from such disclosures during his life-time, the statute would fall far short of the protection which the client is entitled to? It is urged that the proceedings for probate are only to determine whether

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the instrument propounded is decedent's will, and that, therefore, such a disclosure cannot be said to be hostile to the rights or interests of the decedent, or to those succeeding to them. May it not be said, with equal plausibility, that a litigation under an assignment, or conveyance, which only raises the questions as to the genuineness of such assignment or conveyance, would not come under the prohibition? The law regards such an inquiry as hostile to the rights of the assignee or grantee, as well as of the assignor or grantor.

It seems to me that when a will is presented for probate, appearing to have been formally executed, the executor named therein, representing the rights of the estate and the devisees and legatees, succeeds to the rights of the testator, and is entitled to the prohibition of the statute, to prevent any impairment of their rights, and that it would be very illogical to hold that in the interim, before the probate, such rights may be assailed in violation of the statute, with impunity. Again, I am of the opinion that section 836,—which provides for an “express waiver” by the client, renders it impossible that such waiver shall occur, if neither the executor named in the will, nor the legatees under it, represent the decedent until after probate; and it seems to me that, when a will is offered for probate, the legatees and devisees must be held to be entitled to the estate according to the terms of the will, and enabled to take all necessary measures for the protection of those rights through the executor, as though the will were already admitted and their title absolutely vested, and that no presumption against the validity of the instrument should be indulged, as against such rights.

I am of the opinion that all communications by decedent with the witness in the course of his professional employment should be excluded.

In *Edington v. Ætna Life Ins. Co.* (77 *N. Y.*, 564), a physician, who became acquainted with decedent in the winter of 1862, attended him professionally during the next spring and summer, when his professional attendance ceased, but his acquaintance continued till his death. On the trial, he was asked if decedent was cured when he left his hands, in good health, of sound body, and one who usually enjoyed good health in 1867, and whether, in his opinion, excluding any knowledge or information obtained while treating him, and judging from his appearance from that time until 1867, he was in good health, etc. These questions were objected to and excluded, and on appeal such exclusion was held error. Judge EARL, at page 569, says the information excluded under the statute, 2 *R. S.*, 406, § 73, must be such as was necessary to enable him, the physician, to prescribe as a physician, or to do some act as a surgeon. "It is not sufficient to authorize the exclusion that the physician acquired the information while attending his patient, but it must be the necessary information mentioned." It will be observed, however, that the question in that case excluded all knowledge or information obtained while treating decedent, and therefore the language of the learned judge above cited was *obiter*.

In *Sloan v. New York Central R. R. Co.* (45 *N. Y.*, 125), the question was put to the physician, in an action for damages for injury to the plaintiff by the defendant, whether the plaintiff had the venereal disease while

under his care, and under objection was excluded as privileged.

In *Pierson v. People* (79 *N. Y.*, 424), in a case of murder, a physician, who was called to prescribe for the decedent, and who examined and prescribed for him, was asked to state the condition in which he found the decedent at the time, both from his own observation and what decedent told him ; which was objected to under section 834 of the Code, but the objection was overruled, and the court of appeals held the ruling correct, on the ground that there was nothing of a confidential nature in anything he so learned, and that the statute was to protect the patient, not to shield a murderer.

In *Grattan v. Metropolitan Life Ins. Co.* (80 *N. Y.*, 281), a physician who attended the decedent in her last illness, it appearing that he had never visited or seen her except in a professional capacity, was asked if he knew or was able to state the cause of her death ; if he observed the symptoms she exhibited in her sickness ; if the symptoms were such as might have been discovered by observation and physical examination, without the aid of any specific statement from the patient, or without being confidentially disclosed by her, or any friend or attendant, or through any private examination ; and also, if the statement of the insured as to the cause of a death was true. These questions were excluded, on objection, and the appellate court held them properly so excluded, and that it was not required, in the first instance, by formal proof, to show that the information was necessary to enable the physician to prescribe, and that the statute includes all knowledge acquired from the patient himself, from the statements of others surrounding him, and

from his observation of his appearance and symptoms. In *Pierson v. People*, above cited, Judge EARL well says, "but in endeavoring to understand the meaning of words used, much aid is received from a consideration of the mischief to be remedied, or object to be gained by the statute." And in probate cases, I feel constrained to hold with Judge BRADFORD, in *Allen v. Public Administrator*, above cited, that the statute does not apply to a probate case, in respect to the instructions given by decedent to his attorney for the drawing of his will, and the circumstances connected with its execution, nor to the testimony of an attending physician, where he had occasion to treat the patient at or about the time when the will was executed, where the question of mental capacity is the subject of inquiry; for to hold otherwise would make the statute, in many cases, a hindrance to the ascertainment of the most important facts bearing upon the issue to be tried; and I cannot believe that such a construction, as would thus prevent the disclosure of the facts, was in the mind of the legislature when the statute was enacted, or that a construction to that effect would be either just or wise. That his holding is against the letter of the statute cannot be doubted, but in its interpretation it seems to me that it is the duty of the court to take into consideration the object of the statute, and the mischief which would result from its literal construction. The above practice seems to be the safest, until the question shall be settled by the court of appeals. The case of *Bacon v. Frisbie* (80 N. Y., 394), carries the exclusion of communications between counsel and client to a case where the evidence is offered against a third party, without the assent of the client,

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and where the inquiry by the client was hypothetical, and in which there seemed to be serious doubt whether the communication was to the attorney in his professional capacity.

The objection is sustained.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
April, 1881.

GREENHOUGH v. GREENHOUGH.

*In the matter of the estate of CHARLES B. GREENHOUGH,
deceased.*

The surrogate's court has no power, upon an application to amend an inventory of a decedent's estate, to determine the ownership of property, the title to which is disputed. Accordingly, where the applicant seeks to have inserted, in an inventory filed, property which the executor or administrator claims, under oath, as belonging to himself, the motion should be denied.

Sections 2715 and 2716 of the Code of Civil Procedure, have not changed the statutory requirements as to the contents of an inventory.

THIS was a motion on the part of Charles E. Greenhough, an infant under fourteen years, by James Dawson, his general guardian, to compel Martha S. Greenhough, the widow and administratrix of the estate of decedent, to insert certain property in an inventory of the estate, filed by her.

The affidavit of James Dawson set forth facts showing the infant's interest, etc.; the filing of an inventory, January 15, 1881, wherein the property of the estate was appraised at \$368,074.02; and that decedent was possessed of property not included in the inventory, viz.:

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upwards of two thousand shares of stock of the Botanical Garden Railway Company, a corporation doing business in Rio Janeiro.

Upon the return of an order to show cause why the administratrix should not inventory this stock, she presented an affidavit, to the effect that decedent was, at one time, owner of certain stocks of said railway, but that, some time before his death, he made a valid gift and transfer thereof to her, and, at the time of his death, did not own the same. Other affidavits were presented.

W. H. FIELD, *for the motion.*

BUTLER, STILLMAN & HUBBARD, *for the administratrix.*

THE SURROGATE.—This motion raises distinctly the question whether the Surrogate should require an executor or administrator to include, in an inventory, property which is alleged to have belonged to decedent, notwithstanding the inventory first filed, duly verified, and the subsequent oath of the representative,—on a motion to amend the inventory by inserting such property,—that the former inventory embraced all the property of the decedent, and that that stated in the moving papers did not belong to the decedent, but was the property of the representative.

In *Thomson v. Thomson* (1 *Bradf.*, 24), Judge BRADFORD discusses this question under the English authorities, and concludes that where the answer confesses more assets, the court may order the inventory to be amended; but if further assets are not admitted, proof will not be received to contradict the answer, because the inventory is required to be under oath, and the court cannot order assets to be inserted in the inven-

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tory without the party's oath, nor can it compel an executor or administrator to swear to assets, the possession of which he has twice already denied, viz. : once in the inventory, and again in the answer denying the allegation. And the learned Surrogate says : "If this be the rule with the English courts, which claim jurisdiction independently of the statute, *a fortiori*, it ought to prevail here, where the matter is regulated to a minute degree by statute, and where no mode has been provided for impeaching the inventory, though a further inventory may be ordered of assets subsequently discovered."

The same principle is recognized in *Lloyd v. Lloyd* (1 *Redf.*, 399), and such has been the uniform practice in this court ; but my attention has been called to the case of *Young v. Young* (Gen. Term, 3d Dept.), wherein the Surrogate of Sullivan county, on an application to require an administrator to amend his inventory, and insert certain bonds, and the answer of the administrator that said bonds were not the property of decedent at the time of his death, and did not form any part of his estate, assumed to take testimony, and to determine the question as to the ownership of the bonds, and also to direct the administrator to insert the same in his inventory, from which order or decree an appeal was taken to the general term, which modified the decree by striking out all findings of fact and law contained therein, and ordered that the decree be amended by adding, at the end thereof, that the decree or order was without prejudice to any claim or right of Young (the person claiming the bonds) to the same, which claim or demand the administrator was at liberty to state in his inventory thereof if he chose so to do, and to prosecute and have deter-

mined in any court having cognizance thereof. Judge BOARDMAN, in delivering the opinion of the court, on that appeal, says that "the regularity of the proceedings for compelling the administrator to inventory the bonds in question, is not before us, and will not be considered. We may remark, however, in passing, that the acting Surrogate showed an eager, if not undue desire to have the bonds so inventoried that the administrator would be estopped from alleging ownership of them." Again, after reciting the reversal of the order, he says: "But, for the purpose of the identification of dates, amounts, etc., the order to put a description of the bonds on the inventory, without prejudice to the rights of the two brothers, and expressing the nature and extent of the claim, was permitted to stand. That was going very far in guarding the rights of the contestants."

It is too plain for argument that the Surrogate, on such an application, and upon affidavits, has no power to determine the ownership of the stock in question, and it is equally clear that the object of an inventory is in no way subserved by the insertion of property alleged to belong to the decedent on the one side, and denied on the other, where, as in the case of *Young*, it is permitted to stand, so to speak, under protest; for in such a case, the inventory in respect to such stock would not be presumptive evidence against the administratrix, making the inventory, and I can conceive of no beneficial result from such an entry, except perhaps record evidence of the dispute. I am of the opinion that a departure from the present practice would subject Surrogates to such fruitless proceedings, in almost every case, and that the

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mischief resulting therefrom would greatly exceed the benefits derived from such continual insertion of property thus disputed in the inventory ; and I am inclined not only to concur with Judge BOARDMAN, in his opinion in the Young case, that it was going very far in guarding the rights of contestants, to require such entry, but that it was a palpable violation of the uniform practice hitherto prevailing, and a departure from the theory and purpose of an inventory.

As the parties interested may test the question of ownership on the judicial settlement of the representative's account, nothing by way of interest or safety can be lost ; for if the stock were inserted in a qualified way, as in the case of Young, it could not add a particle to the intermediate security of the parties, since it might be disposed of in the meantime, just as well as though not inserted, and the present showing would entitle them to protection to the same extent as though the stock were duly entered in the inventory.

The Code has not changed the requirements or contents of an inventory, as sections 2715 and 2716 only provide the method of compelling the return of an inventory ; and the use of the words "or a sufficient inventory" do not purport to enlarge such requisites, as the commissioners state the source of the first to be sections 17 and 18 of 2 *R. S.*, 85, and of the second, section 22 of said statute, 86. The motion must be denied.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
May, 1881.

SMITH v. BIXBY.

*In the matter of the estate of EUGENIA J. SMITH, lately
an infant.*

The guardian of a female infant expended, for her support, education, etc., \$600 more than the amount of her estate in his hands, this over-payment, however, being less than her interest in the estate of her deceased father, whose will provided that the *income* of her share, in the hands of the executor, might be used for her support. Upon his accounting, at the ward's majority, the guardian sought to be reimbursed from the ward's interest in the latter estate. *Held,*

1. That the court had no power to require a violation of the provisions of the will.
2. That the guardian had no right to make advances to the ward while an infant, and afterwards hold her liable therefor.
3. That the guardian should be allowed his disbursements to the extent of the ward's estate in his hands, and also to the extent of the *income* realized by the executor upon the ward's share in her father's estate.
4. That certain items, each under \$20, not accompanied by proper vouchers or proof, should be allowed, because not exceeding, in the aggregate, \$500.

THIS was a hearing of exceptions to the report of a referee appointed to examine the account of proceedings of Samuel M. Bixby, general guardian, in respect to the estate of Eugenia J. Aldis (now Smith), lately an infant; the report having been heretofore confirmed as to the estates of the other wards included in the accounting.

The guardian was appointed June 22, 1864. The ward's property consisted of an interest in a pension, received from the U. S. Government, amounting to \$310.24, and an interest in certain personal property, amounting in all to \$387.73. The account showed expenditures for

her support, education, etc., amounting to the sum of \$1,004.46, being an overpayment of \$616.73.

The said Eugenia also had an interest (larger than the over-payment) in the estate of her late father, of which estate one Nathaniel Jarvis, Jr., was executor.

The referee reported among other things, that the guardian, whose wife was the ward's aunt, had knowledge of this interest, and that he often consulted Mr. Jarvis in relation to his ward. The referee also reported that the general guardian exercised a sound and wise discretion in his expenditures, and that his conduct towards her was exemplary; also that no testimony was offered as to the other objections filed to the account; and that the guardian "is entitled to be reimbursed from the estate of said Eugenia the said sum of \$616.73, besides his reasonable expenses and commissions, and also the expenses of this accounting."

All of these findings were excepted to by the said Eugenia, who alleged that the referee should have reported that the expenditures were improper and extravagant; that certain specified items of expenditure should be disallowed; and that the guardian was not entitled to be reimbursed from her estate.

C. ELLIOTT MINOR, *for guardian.*

FORBES & SAGE, *for Eugenia J. Aldis.*

THE SUBROGATE.—The testimony in this case justifies the conclusion of the referee that the expenditures for the benefit of the ward were necessary and proper so far as the ward personally was concerned, and if there had been sufficient funds applicable thereto, in the hands of

the guardian, he could not have been adjudged guilty of its improper use. I am also of the opinion that, if there had been sufficient funds so applicable in the hands of the executor Jarvis, an order for its payment to the guardian would have been made, upon a proper application therefor. And I am disposed to hold that, for the purposes of this accounting, that which would have been ordered on the facts proved, should be allowed to the guardian. But the motion has been submitted upon the assumption that all the fund in the hands of the executor, belonging to the ward, might have been ordered by the Surrogate to be devoted to the maintenance and education of the ward.

In that, however, the counsel are clearly in error. The will provides, in substance, that the income of the fund in the hands of the executor Jarvis might be used for the support of the ward, among others, the principal to be paid on her attaining her majority. It is clear that this court has no power to require a violation of the provisions of the will. So that the guardian should be allowed, on account of his disbursements, the sum of \$387.73, together with so much income as has been realized by the executor upon the ward's share in her deceased father's estate.

The application of the guardian for an adjudication that the ward is indebted to him for the balance of his disbursements for her benefit, cannot be sustained, for two reasons: first, because he had no right to make advances over and above the fund applicable to her support, and so make an infant liable therefor; second, because this proceeding is not to adjudge an obligation on the part of a ward for the act of the guardian while she

TUTTLE v. HEIDERMANN.

was an infant, though she might be liable for necessities in a proper action.

Hence the exception to the finding that the guardian is entitled to reimbursement in full should be sustained, and the report, in the above particulars, modified.

The exception to the allowance of certain disbursements without proper vouchers or proof should be overruled, to the extent of the above allowances, for the reason that the sums, under \$20 and not vouched, do not exceed in the aggregate the sum of \$500.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURREGATE.—
May, 1881.

TUTTLE v. HEIDERMANN.

In the matter of the estate of KARL KLAUBERG, deceased.

The testator, by the second clause of his will, gave all his estate, real and personal, to his wife, "to have and to hold during her natural life;" by the third, he gave a specific legacy to his daughters, to take effect at his widow's death; by the fourth to the eighth clauses, he gave devises to descendants, to take effect at his widow's death; by the ninth clause, he gave legacies to descendants, payable at his death; by the eleventh clause, he gave to petitioner, his daughter, a widow without means, a legacy of \$6,000, not specifying the time of payment. Upon an application by the daughter, for payment within a year, on giving security, the executors contended that the legacy was payable only on the death of testator's widow. *Held,*

1. That, by omitting, in the eleventh clause, the restriction contained in the third to the eighth clauses, the testator revoked, *pro tanto*, the second clause, and made the legacy payable before his widow's death.
2. That the legatee's condition raised a presumption that the legacy was designed to meet her necessities during the widow's life-time.

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Ordered accordingly.

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2. That the legatee's condition raised a presumption that the legacy was designed to meet her necessities during the widow's life-time.

TUTTLE v. HEIDERMANN.

3. That the legacy was payable, as in ordinary cases under the statute, at the end of a year from the grant of letters testamentary.

Under Code Civ. Pro., § 2719,—which permits the Surrogate to decree payment to a legatee or distributee, within a year after the grant of letters, where it appears that the funds in the representative's hands "*exceed, by at least one-third*, the amount of all known debts and claims against the estate," etc.,—the required surplus of one-third is to be estimated by excluding the amount of the petitioner's claim and payments already made.

Heard v. Case, 28 *How. Pr.*, 546,—distinguished.

THIS was an application to compel the executors, etc., of decedent to pay to Louisa V. Tuttle, a daughter, a legacy of \$6,000.

The petition of Mrs. Tuttle stated that, by the will of decedent, admitted to probate December 9, 1880, she was entitled to a legacy of \$6,000, and, on information and belief, that Julius Heidermann, and others, the executors, had in their hands property exceeding, by at least one-third, the amount of all claims against the estate, including legacies, applicable to their payment; that, for about six years, decedent was not engaged in business, and lived upon the income of his property, which at the time of his death amounted to about \$120,000; that she believed he owed no debts, and that none would be proved, except for funeral expenses; that she was a widow, with four young children dependent upon her for support, and without property, except necessary household furniture, and the house in which she resided, on which there was a mortgage for \$6,000, due February 9, 1881; that she had no business or means, and the legacy was necessary for her and her children's support. She further alleged a demand and refusal, and prayed for a decree directing payment, upon her giving the security required by law.

The executors, in answer, alleged that they were

TUTTLE v. HEIDERMAN.

advised and believed that said legacy did not become due and payable until after the death of Frances M. Klauberg, decedent's widow; that they had paid legacies aggregating \$2,500, under the ninth clause and codicil of the will, with the consent of the widow, and under the advice of counsel that they were payable before the death of the widow; that the greater part of the estate consisted of real estate, in which the widow had a life interest under the provisions of the will, and which "for the most part" was specifically devised upon her death; that they had in hand a balance of only \$6,347.16, out of which future expenses, commissions, etc., were payable; that, apart from the alleged devises to the widow and others, and the personal property, the estate was worth only about \$2,500; denied, on information and belief, petitioner's allegation as to the value of decedent's property; alleged that she received from members of her family, and especially her mother, money sufficient to support her; and denied that the immediate payment of the legacy was necessary for the support of herself and her children.

The first clause of the will provided for the payment of debts and funeral expenses; the second gave, devised, and bequeathed to testator's wife, Frances M. Klauberg, all his "estate, both real and personal, to have and to hold during her natural life;" the third gave his household furniture and effects, at his widow's death, to his daughters, Amelia F. Ware and the petitioner; the fourth, fifth, sixth, seventh and eighth clauses, devised property to children and grandchildren,—all these devises to take effect on the death of his widow; the ninth clause and the second codicil bequeathed to his three

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U. S. LIFE INS. CO. v. JORDAN.

pelled, therefore, in all proceedings instituted by creditors, to require that the application be made within a reasonable period, and wherever there has been unreasonable delay beyond the period of three years, to refuse the order for the sale of real estate." In that case, there had been a delay of twelve years, and the learned Surrogate held that the petitioner had not sufficiently shown the delay to have been reasonable. And I am inclined to hold, with him, that "unless some limit be imposed upon the exercise of this power, the hidden lien of the creditor will continue to run until he thinks fit to enforce it, while, in the meantime, those to whom the estate has descended are uncertain of their rights, and are restrained in the enjoyment of their property," and "that public policy requires that a power of such formidable import should be strictly construed." This view is confirmed by the time limited by section 2750, above cited.

By *Laws* 1880, ch. 245, § 3, subd. 2, it is provided that the repeal effected thereby does not affect any right, defense or limitation lawfully accrued or established before that act took effect; and that every such right remained as valid and effectual as if said act had not been passed, but that said subdivision did not apply to a case provided for in chapter 4 of the Code of Civil Procedure. To the same effect is section 3352 of the new Code. Hence, if the petitioner's "right" to petition in this matter had "lawfully accrued," when title 5 of chapter 18 took effect, to wit: September 1, 1880, the limitation contained in section 2750 does not apply; for it is clear to my mind that chapter 4 does not apply to such proceedings, either in terms or intent. I am con-

firmed in this opinion by the fact that the act of 1837, as amended, was not repealed by *Laws* 1877, ch. 417, but was repealed by the act of 1880, above cited.

But an examination of *Laws* 1837, ch. 460, § 72, as amended by *Laws* 1843, ch. 211, being § 60 of 3 *R. S.* (6 ed.), 117, shows that the right of a creditor to apply for such sale was dependent upon the fact that the executor or administrator, as such, had accounted to the Surrogate pursuant to chapter 6, part 2, title 3 of the Revised Statutes, and that it appeared that there were not sufficient assets to pay the debts of the deceased.

It affirmatively appears, by the petition in this matter, that no such accounting was had before September 1, 1880, nor has there been such since; and it seems to me clear that no "right had lawfully accrued" to the petitioner, to be saved by the act of 1880 or section 3352 of the Code.

The provisions of section 2750 seem to me to be most salutary, and to relieve against a lax practice heretofore prevailing, tending to render uncertain titles of heirs-at-law, and I should be very unwilling, by enforcing any technicality, to weaken the force of that section, as to the limitation of time relating to such proceedings. I am of the opinion that the petition in this matter does not confer jurisdiction upon this court, to take proceedings for the disposition of the decedent's real property for the payment of debts, and that the proceeding should be dismissed.

Ordered accordingly.

KLEIN v. HAYCK.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
May, 1881.

KLEIN v. HAYCK.

*In the matter of the accounting of FRANCIS HAYCK and
MONMOUTH B. WILSON, executors, etc., of CHARLES
KLEIN, deceased.*

The testator was divorced from his wife in 1857, for adultery with N., and forbidden to remarry. From 1857, until his death in 1879, he cohabited with N., as his wife, without a marriage. By his will, he gave to his "beloved wife," N., all his household furniture, plate, etc., and a life annuity of \$1,000, adding "the above provisions in favor of my wife to be in lieu of dower." Payment of the annuity "in lieu of dower," was opposed by those interested in the residuary estate, on the ground that it was void. *Held,*

1. That the misdescription of the legatee as testator's wife, did not avoid the legacy, as there was no ambiguity in respect to the person intended, and no fraud was practiced on the testator.
2. That the expressed consideration, "in lieu of dower," though untrue and impossible, did not avoid the legacy, since no consideration was necessary to its validity.

MOTION by executors to confirm the referee's report, on their accounting; opposed by the residuary devisees and legatees, the two sons of decedent.

Decedent died in March, 1879. In April, 1852, he married one Charlotte Koch, who in 1857 obtained in the supreme court a decree of divorce from him, on the ground of his adultery with one Maria Naumann, dissolving the marriage, and forbidding his marrying again. From the date of the decree of divorce, to his death, decedent cohabited with said Maria as his wife, and in his will he referred to her as such, though it was admitted that they were never formally married, nor was a common law marriage claimed.

The will provided as follows :

“*Second.* I give and bequeath to my beloved wife, Maria Klein (nee Naumann), all my household furniture, linen, books, plate, cutlery, china and ornaments, her heirs and assigns forever.

“*Third.* I also will and direct that the sum of \$1,000, each and every year from the time of my decease, be paid to my said wife in half-yearly installments, for her use and support during the term of her natural life.

“*Fourth.* The above provisions in favor of my wife to be in lieu of dower.”

The referee found that decedent intended that the several provisions in his will, in favor of said Maria Naumann, should be for her sole individual benefit, and that the several legacies to her were legal and valid, and that a payment of \$50 to her, “on account of her legacy of \$1,000 per annum, was legally and properly made.”

The fourth exception by contestants was to the finding that the executors were entitled to a decree herein finally settling their account as filed by them.

On June 6, 1879, contestants served notice upon the executors, of advice by counsel that said Maria was not the lawful widow of decedent, and was not entitled to dower; that the bequests in lieu of dower were void, and that they are entitled to the whole of the estate, excepting certain specific bequests; and that they make no payments to said Maria Naumann.

The estate consisted principally of real property.

ALLEN, TALMAGE & ALLEN, *for executors.*

F. F. VAN DERVEER, *for contestants.*

THE SURROGATE.—The fourth exception, so far as it

relates to the testator's holding out Maria Naumann as his wife, to the world, and that the provisions in the will, and such holding out, were inconsistent with the theory that he was merely buying her dower right, does not seem to be material in the determination of this motion, provided it shall be adjudged that the legacy is valid, notwithstanding the legatee is denominated the testator's wife, and the legacy is given in lieu of dower ; which latter questions, raised by the same exception, I proceed to consider.

In 1 *Roper on Legacies*, 169, it is stated, as a settled rule, that where the description of a legatee is erroneous, the error not occasioned by any fraud practiced upon the testator, and there is no doubt as to the person who was intended to be described, the mistake will not disappoint the bequest.

In *Smith v. Smith* (4 *Paige*, 271), it was held that a mere misdescription of a legatee did not render a legacy void, unless the ambiguity was such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty.

Jarman on Wills (vol. 1, page 330), states the rule to be that it is sufficient that the devisee or legatee is so designated as to be distinguished from every other person.

It is conceded, in this case, that the legacies claimed by Maria were intended for her, and that the only misdescription is in denominating her the testator's wife, when it appears that she was not, though he cohabited with her as such. Hence it is entirely clear that, but for the legacies being expressed as given in lieu of dower, she would be entitled to them, as it is not pretended that

the testator was fraudulently imposed upon by her, but clearly proved that he voluntarily cohabited with her, with a full knowledge of all the facts.

In *Giles v. Giles* (1 *Keen*, 685), it was held that a false character, attributed by a testator to a legatee, would not affect the validity of the legacy, unless the false character had been acquired by a fraud which had deceived the testator; and that, where the testator and legatee had a common knowledge of an immoral or criminal act by which the legatee had acquired the false character, the rights of the legatee as such would not be affected,—it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights.

The numerous authorities cited by counsel for the contestants, to the point that a widow, accepting a pecuniary provision in lieu of dower, is considered a purchaser for value, and the dower interest surrendered constitutes the consideration for the purchase, cannot be controverted, but indisputably state the true principle. But I am of the opinion that he seeks to deduce therefrom an erroneous conclusion in this case,—that the legacies are without consideration, because the legatee had no claim to dower, and therefore void.

When it is conceded, as it must be, that, but for the statement of that alleged consideration, the legacies would be valid, as no consideration was necessary to their validity, I am of the opinion that the stating of an untrue or impossible consideration does not affect their validity, for the reason that the testator knew that the decedent was not his wife, and will be presumed to know the effect of their unlawful cohabitation,—that the legatee

GREER v. GREER.

had no legal claim upon his estate for dower ; particularly as it is not pretended that he was deceived by her into assuming any such claim. This exception should therefore be overruled.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
June, 1881.

GREER v. GREER.

In the matter of the accounting of GEORGE B. GREER, trustee of JULIA GREER, under the will of GEORGE GREER, deceased.

The testator, by his will, created a trust for his daughter, directing the trustee to hold the share of the estate belonging to her; to pay to her, until her majority, rents and income sufficient for her support and education; all the rents and income thereafter, until she reached twenty-four years, and then the principal and accumulations. He further directed the trustee to deduct and retain "out of such rents, profits, interest, and income," while he held the share, "all proper and reasonable expenses and charges, in and for the care and keeping of the same, the renting, investing, and re-investing thereof," all taxes, etc., "and the proper expenses and charges of collecting and applying such income." The trustee claimed that the words quoted were a provision for compensation in lieu of commissions. *Held,*

1. That the words "expenses and charges," etc., referred not to compensation of the trustee, but to necessary disbursements in administration, and imported an intent that the daughter was to be supported out of the net income of the trust fund.
 2. That the trustee was only entitled to commissions under the statute.
- The rule for computing trustee's commissions, in such a case,—stated.

APPLICATION for the settlement of a decree on the final accounting of a testamentary trustee.

The trustee, on the final settlement of his account, in

1872, as executor, etc., of his father, George Greer, accounted for \$204,951.60, as principal of said trust, and was directed to retain the same. Since such accounting he had received, in income, \$170,583.22, paid out \$61,215.07, and invested the balance, leaving in his hands \$314,319.75. As trustee, he claimed the right to charge the fund with the value of his services in the administration of the trust, instead of the usual commissions, under the provisions of the testator's will creating the trust, by which said George B. was to hold the share of the estate belonging to Julia, to pay the rents and income necessary, in his discretion, for her education, support and maintenance, until she should become twenty-one years old; then the whole rents and income to her use until she should be twenty-four years old; then to assign and pay over the principal and all accumulations to her; "but always deducting and retaining out of such rents, profits, interest and income, while this part or share is held or retained by the said George B., as trustee as aforesaid, all proper and reasonable expenses and charges, in and for the care and keeping of the same, the renting, investing and re-investing thereof, all taxes and assessments that may be imposed thereon, and the proper expenses and charges of collecting and applying such income."

C. H. WOODRUFF, *for trustee.*

G. W. VAN SLYCK, *for cestui que trust.*

THE SURROGATE.—It is claimed by the trustee's counsel, that the term "expenses and charges," for the care and keeping of the fund, and collecting and applying the

income, was intended as a provision for the compensation of the trustee for his services, instead of commissions. I am of the opinion that the decedent, by the use of this language, did not intend to provide compensation to the trustee for the administration of his trust, in lieu of the statutory commissions, and that, if he had so intended, it would have been clearly stated ; but that he did intend that the amount realized as income should be charged with the current expenses of administration, instead of imposing such charges upon the principal fund ;—in other words, that Julia was to be supported out of the net income of the trust fund.

The provisions of the will plainly contemplate that a portion of the trust would be real estate, from which rents would be derived, and the reasonable expenses and charges for the care and keeping of the same might well refer to the care of such real estate, the necessary repairs and insurance thereof, and, perchance, the collection of the rents through an agent, or by suit. The same might be said of securities by way of mortgage ; and the renting of the premises might involve the employment of competent counsel to draw the lease, or the renting through an agent ; and the investing and re-investing might also, as is customary, be made through an agent, and involve the examination of title to land ; and the expenses and charges of collecting and applying income may well refer to the enforced collection of rent or interest, and the application of such income might involve the transmission of funds to the beneficiary, when at school or abroad.

I am entirely clear that the trustee is only entitled to commissions according to the statute, and that they,

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together with the expenses of this accounting, should be paid out of the income which has been invested by the trustee.

The rule for computing the commissions should be—full commissions of five, two and one-half, and one per cent., on the income received and paid out, and one-half of one per cent. on the amount of capital and income now remaining in the trust.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
June, 1881.

WALKE v. HITCHCOCK.

In the matter of the estate of CYRUS HITCHCOCK, deceased.

The testator, who died in 1854, by his will nominated A., B., C. and D., as executors and trustees, and directed that neither of them should be accountable for more funds of the estate than he should actually receive under the will. A. and B. qualified forthwith; B. died in 1871; C. qualified in the same year, and D. qualified in 1872, notified A. and C. of his appointment, and offered to act. But the two latter continued to control and manage the estate; and on their accounting, D. applied for commissions from the date of his appointment. *Held*, that as the statute provides for an allowance of commissions on the settlement of an account, for services, for receiving and paying out moneys, and does not authorize an equitable adjustment of commissions among several representatives, and as D. presented no account, had rendered no services, nor received or paid out any money, his application should be denied.

As to whether D. would have a remedy at law against A. and C. for improperly preventing him from performing his duty as executor,—*quære*.

MOTION on behalf of Cornelius Walke, that he be de-

creed entitled to commissions as executor, on the settlement of the accounts of the executors, etc., of decedent; opposed by executors Hitchcock and Titus. The testator died in June, 1854, leaving a will, nominating Julius S. Hitchcock, Richard A. Reading, George N. Titus, and said Cornelius Walke executors and trustees thereof. Hitchcock and Reading qualified August 5, 1854, and accounted March 7, 1861, for \$219,200.69, personal property. Reading died in June, 1871. George N. Titus qualified December 12, 1871. Cornelius Walke qualified January 11, 1872, and, as his counsel stated, immediately gave notice of his appointment to Hitchcock and Titus, offered to enter upon the duties of his trust, and had always been ready and willing to act; but the other two executors continued to control and manage the estate. Since Walke's appointment, they had paid to the testator's widow all the income of the estate, amounting to \$168,800, in the capacity, as Walke claimed, of executors, but, as they claimed, of agents. The accounts of the active executors, filed, showed in their hands, as personal property, a principal sum of \$274,668.76; and Walke claimed one-half commissions, for receiving said principal sum, and full commissions on receiving and paying over the income since he qualified, viz.: on \$168,800.

The will gave and bequeathed to testator's wife the use of, and the income to be derived from, all the rest and residue and remainder of his estate, both real and personal, after payment of debts and certain bequests, for and during the term of her natural life; and at her death gave to his executors, or to such of them as should become duly qualified to act, three separate equal parts of the residue and remainder, in trust for the use and

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benefit of three children, with power to receive the rents and profits, income, etc., and apply them to the use of said children for specified periods, with remainder over ; neither executor to be chargeable with or accountable for more of said moneys or estate than he should actually receive, or should come to his hands by virtue of the will.

P. W. WILDEY, *for the motion.*

T. WESTERVELT, *opposed.*

THE SURROGATE.—Section 71, 3 *R. S.*, 101 (6 ed.), provides that, on the settlement of an account of an executor or administrator, the Surrogate shall allow to him for his services, and apportion among them, if there be more than one, according to the services rendered by them, respectively, for receiving and paying out all sums, etc. But if the personal estate amount to not less than \$100,000, over debts and liabilities, each executor or administrator shall be entitled to and allowed full commissions, to the number of three, and if more than three, three commissions shall be divided among them.

In this case, the executor Walke presents no account of receipts or disbursements, nor does it appear that he has rendered any "services" in receiving or paying out *any* sums of money belonging to said estate. And, as it is entirely clear that there is no authority in this court, under the section cited, to adjust, upon equitable principles, the compensation to be allowed to the respective executors, I am of the opinion that this court has no power to determine the rights of the executor named, as against the active executors, for their alleged improper preventing him from the performance of his duty. Therefore I am

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not called upon to determine whether he has any remedy at law for such prevention.

The fact that the basis of allowance of commissions is the amount received and paid out, and that in this case no sum has been received or paid out, seems to me to afford a complete answer to the application. The motion should be denied.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
July, 1881.

MERRILL v. ROLSTON.

In the matter of the probate of papers propounded as the last will and testament, and a codicil thereto, of CAROLINE A. MERRILL, deceased.

The setting aside or rejection of a will by a court, is the exercise of a radical judicial prerogative, which should not be indulged, except upon very satisfactory proofs.

One who is next of kin to a decedent has an interest which entitles him to contest the probate of an alleged will of the latter; and the same is true of one who, by the admission of the will, would be deprived of rights under a former one.

Partial insanity, or monomania, invalidates a will which is the direct offspring thereof, though the testator's general capacity be unimpeached. An insane delusion is one which not only is founded in error, but is without evidence of its truth, and often exists against the clearest evidence to the contrary. Its essence is that it has no basis in reason, and cannot be dispelled thereby.

The decedent and her husband, in 1838, informally adopted G., the former's nephew, with the intention of leaving him their property, educated him at Trinity College, Dublin, and traveled with him in Europe. G., at their request, took their name, and always afterwards bore it. The husband, who always manifested great affection for G., died in 1867, leaving a will made in 1856, which gave to G. \$30,000,

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and all his property, in case the former survived decedent. The latter made a will in 1856, giving all to her husband if he survived her, otherwise to G. In 1854, G. engaged in business in New Jersey, and, during some years thereafter, living apart from his adopted parents, received numerous letters, from time to time, from decedent, the general tenor of which was one of deep interest, admiration, and affection, she addressing him as her dear son, etc., and signing as his affectionate mother. In 1862, G. married an estimable lady, against decedent's will, his engagement having already led to an estrangement from, and his rejection by decedent. In numerous letters thereafter, and down to the close of her life, though the character and conduct of G. remained, in all respects, exemplary, decedent repeatedly expressed her dislike, distrust and hatred of him; refused him her name, suggesting that if he had married one of certain persons specified, his name would have been hers; mutilated her will of 1856 and his portrait, cutting from the latter the mouth and thumb, as an evidence of her displeasure; addressed to him violent and senseless imprecations, and indulged in vulgar and baseless charges against the character of himself and wife. There was also evidence of strange and eccentric conduct on decedent's part, in other respects. In 1871, she executed the paper propounded as her will, in which she ignored G., and gave the bulk of her fortune to charities, and to clergymen of the Roman Catholic Church, of which church she had become a member since 1856. In 1875, she executed the paper propounded as a codicil, reciting the death of Bishop Bacon, a legatee, and substituting Cardinal McCloskey. Two prominent ecclesiastics of said church aided in the preparation of the codicil, and signed the same as witnesses, but took no benefit thereunder. Contestants put in issue decedent's mental capacity, and freedom from restraint. *Held,*

1. That the facts relating to the execution of the codicil did not justify any presumption or suspicion of undue influence.
2. That, upon the whole evidence, no reasonable doubt arose of the general capacity of decedent, and the unrestrained execution of the will and codicil; and that the same must be adjudged valid, unless vitiated by an insane delusion respecting G.
3. That decedent's said adopted son had an interest which entitled him to contest the probate of the instruments propounded, and that they should be refused probate, because executed by her while laboring under an insane delusion concerning him,—the same being the direct offspring of such delusion.

The influence or importunity which is sufficient to avoid a will must be such as amounts to moral coercion, restrains independent action, destroys free agency, and makes the will the act of another than the alleged testator; it must have been exercised with regard to the very act, and the exercise will not be inferred from opportunity or interest. The earnest presentation to a testator, by a spiritual adviser, of proper ar-

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guments, and the enforcement of motives, whereby the intellect is persuaded and the conscience quickened, are legitimate influences, and the results praiseworthy, where they do not violate natural obligations.

APPLICATION for the probate of a will and codicil.

The paper propounded as the will was dated May 2, 1871, witnessed by Cyrus W. Field and Benjamin Cartwright.

After providing for the payment of debts and funeral expenses, it gave to New York Hospital \$50,000 ; to the Sisters of Charity of St. Vincent de Paul, \$5,000 ; to the Portsmouth Athenaeum, N. H., \$2,000 ; to Cardinal McCloskey, \$50,000 ; and in case of his death to his successor, or in case of vacancy to the Ordinary ; to decedent's niece, Caroline S. Delgado, \$5,000, household furniture, ornaments and wearing apparel ; to Doctor George H. C. Salter, \$5,000 ; to Bishop Bacon, of Maine, all the residue ; to his successor in case of his death, and in case of the vacancy of the office, to the Ordinary. Moses Taylor and R. G. Rolston were appointed executors.

The paper propounded as the codicil was dated December 9, 1875, witnessed by Drs. Chatard and Smith, recited the death of Bishop Bacon and the lapse of the legacy, and gave the property given by the will to him to Cardinal McCloskey, and in case of his death before decedent, to Rev. Thomas S. Preston ; and recited the lapse of the legacy to Dr. Salter, and directed the executors to pay the interest on that sum to his daughter Mabel until twenty-five years old, then the principal to her ; and revoked all parts of the will inconsistent with the codicil, and a codicil executed in Rome, January, 1875.

Objections were filed by George Merrill, a nephew and

alleged adopted son, together with numerous other next of kin, no nearer than he, putting in issue the mental capacity and freedom from restraint of decedent. Further facts sufficiently appear in the opinion.

TURNER, LEE & McCLURE, *for R. G. Rolston, proponent.*

J. K. PORTER, *for Cardinal McCloskey.*

F. F. VANDERVEER, *for Bishop Healey.*

JOHN E. PARSONS, *for Geo. Merrill.*

HOMER A. NELSON, D. R. JACQUES, D. C. BROWN, and EDW. GEBHARD, *for next of kin.*

THE SURROGATE.—[After giving an abstract of the evidence, which was very voluminous.]—The questions to be determined from the evidence are :

First, whether the decedent, when she executed the will and codicil propounded, was of sound and disposing mind, or of such impaired intellect as to render them void under our statute.

Second, whether the decedent, being of sound and disposing mind, was unduly influenced in the execution of said will and codicil, or either.

Third, whether, if mentally sound in other respects, she was laboring under an insane delusion, or was a monomaniac as to the relations and conduct of her so-called adopted son, George Merrill, his feeling and conduct towards her, his marriage, and the character of his wife.

Fourth, whether, assuming that she was laboring under an insane delusion in respect to George Merrill, and his conduct and feeling towards her, his relations to and claims upon her were such as, according to law, will avoid the will and codicil.

Fifth, whether the will and codicil devised and bequeathed more than half of decedent's property to any benevolent, charitable, literary, scientific, religious or missionary society or corporation, in trust or otherwise.

There being no question raised as to the sufficiency of the proof, to establish the due and formal execution of the instruments propounded, I proceed to consider the above points in their order.

The principal facts upon which the contestants claim to have established the mental unsoundness of the decedent when the will and codicil propounded were executed are: *First*, the material changing of the provisions from that of her will of November 15, 1856, especially in regard to her adopted son, George Merrill, so called, and the disposition of the major part of her property to Roman Catholic officials or charities. *Second*, the extraordinary and violent change of sentiment and feeling on decedent's part towards George, from the great and demonstrative affection, warm interest and pride in him and his character and attainments, to the most extravagant distrust, dislike, hatred and vindictiveness towards him, culminating in his disinheritance.

Her change of religious belief.

Her unreasonable and extravagant conduct respecting the loss, by her husband, of \$600, by Green & Co., and her absurd talk about that loss and measures taken to redress it.

The alleged change of the decedent in her dress and personal habits, testified to by quite a number of witnesses having full opportunity to observe.

Her singular manifestation of interest in, and affection

for her courier, Maffei, and the indelicate familiarity of intercourse and correspondence between them.

Her alleged intemperate habits and eccentric and irritable demeanor, incoherency of speech, and strangeness of disposition, testified to by quite a number of witnesses, especially her suggestions to Mrs. Clift and to Mr. Leland, of her being poisoned, chronic dislike of her own sex, her conduct before the Surrogate of Brooklyn in the Knight matter, her treatment of Mrs. Kelly and her washing bill, her strange conduct at Washington, at her interview with the President.

Her alleged insane delusion and irrational conduct respecting George Merrill, his supposed neglect of her and her husband, his improper interference in the Green & Co. matter and her business affairs, his want of interest in and attention to her, and her wishes, particularly as to his marriage, his character and intercourse with his wife, her character, and that of her relative Mrs. Clift, her oft-repeated statement, that his adopted father distrusted and felt no affection for or interest in him, her belief that the Green & Co. loss had killed her husband, her charging George with the duty of pursuing them even to the expenditure of her whole estate, her apparently purposeless mutilation of her will of 1856, and her mutilation of George's portrait, and the reasons stated therefor, and her fiendish imprecations, contained in several letters, upon him; all of which facts seem to be to some extent sustained by her own letters and well-attested declarations, principally proved by Mr. Field, Dr. Harris, Stewart Brown, Mr. Sherman, Thurlow Weed, Fanny Post, General Saxton, Mrs. Salter, Mrs. Mitchell, Mr. Barrett, Abby Gross, Mrs. Hawkins, Mr. Putney,

Mr. Luce, Mr. Gleason, Mrs. Laine, Mr. Platt, Mrs. de Reau, Mr. and Mrs. Borgogni, Drs. Fideli, Mr. Franceschini, Mary Ellis, Mr. Tuckerman, Drs. Hadden and Quackenboss, and George Merrill. But Mr. Field, Mr. Weed, Moses Taylor, Messrs. Saxton, Mr. Hawkins, Mrs. Laine, Mr. Platt and Mr. Tuckerman only testify in respect to her apparent insane delusion respecting George and his wife, and the Green & Co. matter; the Doctors Fideli both disclaim any intention to express the opinion that she was in any sense insane, but they deemed her absurdly eccentric, and sometimes incoherent and excitable; several of those witnesses, particularly Messrs. Weed, Taylor and Field, testify to facts which leave no doubt as to her entire soundness of mind, except as to her so-called delusion respecting George Merrill and his wife.

The testimony which is relied upon to controvert the allegation of mental unsoundness, is that given by Mr. Field, the surviving witness to the will, Mr. Glover, who received the instructions of decedent for the will, drew it and submitted it to decedent for her consideration and approval, and who supervised the execution; that of Moses Taylor, who saw her about the time of its execution; that of Drs. Chatard and Smith, the subscribing witnesses to the codicil, whose testimony concurs in respect to the mental soundness of the decedent, and clear intelligence when those instruments were executed respectively, and the death of Bishop Bacon, rendering it proper and necessary for a codicil; that of Catharine Welsh, who observed no eccentricity of dress or untidiness of her room at the Astor House; Mrs. Smith, who concurred in that testimony, and who testified to her

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manifesting an interest in Bishop Bacon and Archbishop McCloskey and the Catholic Church ; Vicar-General Quinn ; Mr. Foley, the attorney at Saratoga ; Mrs. Kelly, who sued decedent for her washing bill ; Mr. Stetson, the hotel-keeper, where decedent passed much of her time ; Mrs. Thompson, who saw decedent in Rome in 1874 ; Mary Seton, who saw much of her in 1869, and afterward instructed her in the faith, and visited her several times ; Mr. Usher, whom she informed that she had settled her affairs with Bishop Bacon, and intrusted them to Cardinal McCloskey ; Mr. Shea, a waiter at the New York Hotel in 1864 and 1865 ; Mrs. Davis, who met decedent in Rome about 1868, and with whom decedent conversed about George ; Mr. O'Toole, a porter at the Fifth Avenue Hotel in 1864 or 1865 ; Catherine McNierny, a chambermaid at the Fifth Avenue Hotel ; Bridget Reynolds, chambermaid at the same ; Patrick Houlahan, porter at Saratoga ; Mary Gurney, chambermaid at Fifth Avenue Hotel ; Bishop McNierny, who saw decedent in Europe early in the year 1877 ; Mary Welsh, chambermaid at the Fifth Avenue Hotel ; Mr. Gordon, porter at the Sturtevant House ; Mr. Lugani, hotel-keeper at Rome,—all testify to her intelligence, rational conduct and conversation. Several of the servants and hotel-keepers state that they found her room in order ; that her dress was not particularly observable or eccentric, and that her person and conduct were not such as to attract particular attention or excite observation. Added to those, we have the fact that decedent continued to travel from place to place, crossing and recrossing the ocean, attending to the payment of her bills and fare ; a diary of her travels and book of account,

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commencing with January 23, 1872, and continuing down to July, 1876, in which are entered numerous items of receipts of money from her bankers in Rome, embracing over twenty items; various letters of decedent, one of instructions to Bishop Bacon, evincing judgment, discretion, propriety of expression and entire coherence; a short letter of hers to Mr. Taylor, under date January 17, 1873, showing her intellect clear and coherent; indeed, it may be said that nothing which decedent appears to have written, down to the attempted instructions, in the autumn of 1877, to Mr. Merrihew, just before her decease, shows any evidence of mental weakness or aberration. I leave out of consideration the attempted instructions to Mr. Merrihew for a new will, and the material difference in her expressed wishes and inconsistent memorandum furnished to him for the purpose of drawing her will, for the testimony of Drs. Quackenboss and Hadden, and her attendant, and of Mr. Merrihew, leave no doubt in my mind that at that time she was not in such mental condition as to render her responsible for what she did, and any expression of desire at that time seems to me entirely without significance in respect to the terms of the will and codicil propounded.

I am therefore of the opinion that upon all subjects, except her relation to George Merrill and wife, and their character and conduct, and the matter of Green & Co., she was of sound and disposing mind when the will and codicil propounded were executed, and that she had capacity to make and execute them if unrestrained.

It seems to me that a careful and proper weighing of the testimony, with reference to the time when the transaction occurred, shows that the decedent at the time

when she executed those instruments had sufficient capacity to comprehend the condition of her property and her relation towards the persons who were or might have been the objects of her bounty, and the scope and bearing of the provisions of her will (*Delafield v. Parish*, 25 *N. Y.*, 9; *Van Guysling v. Van Kuren*, 35 *Id.*, 70; *Tyler v. Gardiner*, *Id.*, 559; *Kinne v. Johnson*, 60 *Barb.*, 69; *Meeker v. Meeker*, 75 *Ill.*, 260; *Bundy v. McKnight*, 48 *Ind.*, 502).

The codicil makes no material change of the provisions of the will, except such as became necessary by reason of the decease of Bishop Bacon, which fact and necessity seem to have been intelligently comprehended by the decedent, and to have been the motive for the execution of the codicil; and hence I am of the opinion that unless the decedent was laboring under an insane delusion or monomania upon the subject of George Merrill's relation to her and his claims upon her bounty, she was of sufficient mental capacity under the authorities to execute the instruments propounded.

Sir JOHN NICOLL, in *Dew v. Clark* (1 *Add.*, 279; 3 *Id.*, 79), well says that no course of harsh treatment, no sudden bursts of violence, no display of unkind and even unnatural feeling merely, can avail in proof of alleged insanity, and it is equally clear that mere eccentricity, however remarkable, does not constitute any certain evidence of insanity.

In *Morgan v. Boys* (*Taylor's Medical Jurisprudence*, 57), testator's will was sustained where it disinherited the heir, or next of kin, directed the executors to cause some parts of his bowels to be converted into fiddle strings, that others should be sublimed into smelling

salts, and that the remainder of his body should be vitrified into lenses for optical purposes, and where in a letter attached, decedent said, "the world might think that it was done in a spirit of singularity or whim, but that he had a mortal aversion to funeral pomp, and wished his body to be converted into purposes useful to mankind." it appearing that decedent conducted his affairs with great shrewdness and ability, and so far from being imbecile, had always been regarded through life as a person of indisputable capacity. Sir HERBERT JENNER held the proof not sufficient to establish insanity, that it amounted to nothing more than eccentricity, and remarked that he did not insist that the mere absurdity and irreverence in the mode of bestowing his own body, as a sacrifice to the interest of science and art, in so bald and awful a mode, was to be regarded as plenary evidence of mental aberration.

In *Thompson v. Thompson* (21 *Barb.*, 107), the decree by Judge BRADFORD admitting the will to probate (2 *Brad.*, 449), was affirmed. Judge MITCHELL, giving the prevailing opinion, says, at page 113: "Erroneous, foolish, and even absurd opinions on certain subjects, do not show insanity, when the person entertaining them still continues in the possession of his faculties, discreetly conducting not only his own affairs, but the business also of others."

In that case, before the Surrogate, the most extraordinary, absurd and senseless opinions, in reference to matters not connected with the disposition of his property, seem to have been entertained by the decedent for many years, but, for the reasons above stated, he was held to have been of sound and disposing mind.

There seems to be no proof, tending to show the exercise of undue influence upon the decedent in the execution of her will, except that which is to be inferred from the difference in its provisions from those of her former will of 1856 ; and that change is measurably explained by the fact that she had in the meantime become an adherent and member of the Roman Catholic Church, and deeply interested therein, and that she supposed and believed that George Merrill had forfeited all claim to her bounty, and occupied a hostile attitude towards her, personally.

As to the codicil, the only suspicion that can be suggested of undue influence is that Dr. Smith and Dr. Chatard, who were prominent ecclesiastics of the Romish Church, and appeared, particularly the former, to exercise some influence over decedent, were subscribing witnesses, and that the counsel for the principal beneficiary, Cardinal McCloskey, was engaged to formulate the codicil, from the instrument informally executed by decedent and prepared by Dr. Smith ; but Dr. Smith testifies that, so far from exercising influence over the decedent in respect to the terms of the codicil, he urged a recognition of the claims of George Merrill by the decedent, but without effect ; beside, it is clear, from the rough memorandum prepared by the decedent, that she appreciated the propriety and necessity of a codicil, to meet the exigency of Bishop Bacon's decease, and there appears to be no reason why Dr. Chatard and Dr. Smith should desire the property to go to Cardinal McCloskey, instead of to the successor of Bishop Bacon, the suggestion of its going to the latter being rejected by the decedent for personal reasons, doubtless satisfactory to herself, so

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that there is only left the suggestion that the codicil finally executed was prepared by Mr. Glover, the attorney for the cardinal, doubtless sent to him for the purpose of being put in legal form, as he was familiar with the laws of this State, and was then temporarily domiciled in Paris.

It may be urged, as a badge of improper interference with decedent's testamentary purpose in making her codicil, that in the memorandum which she prepared in her own handwriting, she referred to the property she had given by will to Dr. Bacon to use as she made known to him, and left it in trust to Dr. McCloskey and Moses Taylor, to be spent in the same way as it would have been by Dr. Bacon had he survived, and referred her trustees to her lawyer, Mr. Glover, for the full particulars of her plans for charity and benevolence; that, in a memorandum in the handwriting of Dr. Smith, the property was stated to be given and bequeathed to the Most Rev. John McCloskey, Archbishop of New York, and the Rev. Thomas S. Preston, while the instrument dated January 13th, 1875, at the top, and at the bottom 16th of same month, signed by decedent and witnessed by Drs. Chatard and Smith, gave the same to Archbishop McCloskey and the Rev. Mr. Preston, without any suggestion of trust or object of bequest, and which in the codicil propounded bequeaths the same to the cardinal, and in the event of his death before the testatrix, then to the Rev. Thomas S. Preston absolutely. Still it appears that decedent had possession of the codicil, as finally executed, for several days before its execution, and hence, in the absence of other testimony, may be presumed to have understood the changed provisions and

phraseology. It is to be borne in mind that she had been told, at the time he was preparing her will, by Mr. Glover, that it was difficult to draw a trust for a general charity that would be valid, and the will in its devise to Bishop Bacon ~~was~~ made absolute, and her clear letter of instructions or statement of the object of her bequest, of date November 20th, 1871, addressed to Bishop Bacon, shows that she understood the absolute character of the bequest, and his sole right to dispose of it as he chose; but it is left to conjecture whether she intended to follow the codicil by a letter of instructions as in the case of Bishop Bacon.

The influence or importunity which will avoid a will must be such as to deprive the testator, at the time, of the free exercise of his will, whereby the instrument becomes the will of another mind, rather than that of the testator; such undue influence must have been exercised in respect to the very act, and the act must be proved, and will not be inferred from opportunity and interest (*Gardiner v. Gardiner*, 34 *N. Y.*, 155; *Seguine v. Seguine*, 4 *Abb. Ct. App. Dec.*, 191; *Kinne v. Johnson*, 60 *Barb.*, 69; *Cudney v. Cudney*, 68 *N. Y.*, 148; *Deas v. Wandell*, 3 *S. C. [T. & C.]*, 128).

The influence exerted must appear to have amounted to moral coercion, which restrained independent action and destroyed free agency, or have been such an importunity as the testator was unable to resist, and which constrained him to do that which was against his free will and desire (*Children's Aid Society v. Loveridge*, 70 *N. Y.*, 387).

Where the will is the offspring of an influence brought to bear upon the testator, in any manner, so as to over-

come his free agency, it cannot be sustained by law (*Redf. Am. Cases on the Law of Wills*, 472, note).

No matter how little the influence, if free agency is destroyed, it vitiates the act which is the result of it (*Rollwagen v. Rollwagen*, 63 *N. Y.*, 504, 519; *Jarman on Wills*, p. 36).

In *Rollwagen v. Rollwagen*, Judge RAPALLO says: "The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person," citing many authorities.

In *Forman v. Smith* (7 *Lans.*, 443), MILLER, P. J., says: "Direct proof of undue influence can never or at least rarely be given, and ordinarily it must be established by circumstances and inferences to be drawn from facts and the character of the transaction. . . . It also raises a violent presumption of undue influence where a will executed by an old man differs from his previously expressed intentions, and if it is made in favor of those who stand in confidential relationship to the deceased, which should be overcome by satisfactory testimony" (See, also, *Matter of Humphrey*, 26 *N. J. Eq.*, 513; *Sears v. Shafer*, 6 *N. Y.*, 268; *Lake v. Ranney*, 33 *Barb.*, 49; *Newhouse v. Godwin*, 17 *Id.*, 236; *McLaughlin v. McDewitt*, 63 *N. Y.*, 213; *Heguenin v. Baseley*, 14 *Vesey*, 299).

Is there to be any adverse presumption indulged in, in this case, because Drs. Smith and Chatard, Roman

Catholic priests, were present, aided in preparing the codicil, signed as witnesses, and Dr. Chatard forwarded the informal instrument to Mr. Glover for the purpose of having the same put in legal form? It seems to me not, because neither of those persons took any benefit from the codicil, nor is the instrument, in any substantial sense, different from her will or her declared intention, nor can it be strictly said that they stood in such a relation to decedent, as to raise any adverse presumption or suspicion.

In the Marx Will case (4 *Redf.*, 455, 482, 483), I endeavored to lay down a practical and safe line of conduct for a spiritual pastor or teacher in the performance of his duty in such matters; to which I would add that, if by the earnest presentation of proper arguments, and the enforcement of motives, the intellect shall be persuaded, the conscience quickened and the judgment convinced, not "by constraint, but willingly," such influences are legitimate, and the results praiseworthy, where they do not unreasonably trench upon or violate natural obligations. "Charge them who are rich in this world, that they be ready to give, and glad to distribute," is the expression of a plain pastoral duty, to be enforced not by such importunity as shall dominate the will, but so as to produce "a ready mind." "Let every man do as he is disposed in his heart, not grudgingly, or of necessity." Indeed, it would be a reprehensible invasion of priestly prerogatives to forbid or discourage the earnest and impressive admonition to such an obvious and bounden duty. Upon a careful consideration of the testimony in this case, I am of the opinion that it does not raise a reasonable doubt of the unrestrained execu-

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tion of the instruments propounded as decedent's last will and testament, and codicil thereto.

This brings me to the consideration of the third point above stated, and the following dates become material in its consideration :

Decedent and her husband informally adopted George Merrill about 1838 (he being a nephew of decedent), with the intention of leaving him their property ; and in 1852 decedent and her husband met George at Liverpool, when he was a student at Trinity College, Dublin, where he graduated soon after, and traveled with them in Europe, and sailed for America, they having preceded him, not desiring to risk the lives of all three on the same ship ; prior to which he took, at their request, the name of Merrill, and has borne it since.

In 1854, he went to Newark, New Jersey, to superintend the zinc works. In the latter part of that year, an alarming strike of the workmen occurred, which was soon after communicated to the decedent and her husband, who in January and February thereafter wrote to him upon the subject. The father died May 6, 1867, leaving a will dated November 17, 1856, giving George \$30,000, and all in case of decedent dying before her husband ; decedent made a will November 15, 1856, giving all her property to her husband, but in case of his death before her, to George ; George married October, 1862, having been previously rejected, and communicating the fact to decedent, as to which decedent wrote him in February, 1860.

In a letter of January 9, 1845, she addressed him as " My dear George," and closed " Your affectionate mother," in which she stated, if she should not be per-

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mitted to see him again, she gave him all her property of every description ; another in the autumn of 1854 was addressed and concluded in the same way, expressing distress about his cold. In a letter of January 6, 1858, she advised him to marry. In one of May, in the same year, she charged him to reserve a certain portion of her property, and after proving her will, to devote it to the settlement of the Green & Co. business, and said that they killed his father, which he declared many times, and that if he hoped to be blessed through life and happy at death, he should scrupulously attend to her wishes to those murderers of his father.

Decedent, in her letter of December 4, 1862, stated that her husband, a few months after he met with George in Liverpool, expressed the opinion *that he was without natural feeling, affection, gratitude, talents, or an appreciation of goodness ; that when he reached Liverpool, he saw him a monster and selfish brute, and from that time he refused to give him his name ; that she had never liked him from the day she met him in Liverpool ; that her husband said, when making his will, that she would see him a bad man ; that he had all the elements to make a very bad character ; that since her husband's death she had more closely watched him, and was long ago completely convinced that he was entirely without principle, truth, natural affection, faith in religion, in fact, every element that made a human being above a brute, and that she had not discovered in him one element of good, one redeeming quality, and spoke of his marrying a woman who had seduced him—about a lady seeing him off when he left the city, and that Miss Laing was engaged to be married*

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to him, and that if he married her he would not require a honeymoon, which implied the necessity of rest after taking a virgin for a wife, but in his case there would be no necessity—no exhaustion would follow, but, having taken her, he must be an uncommonly powerful animal if she did not put him in a consumption before the anniversary of his wedding; and commented very sharply upon the conduct of some ladies, who were gathering presents for him, to be sent while he was at the war; magnified, as a serious offense, that she had heard of Miss Laing's notorious character, and threatened that if the day came when he called her his wife with the name of Merrill, he would hear something that he would pray that the ground would open and swallow him up, and referred to his sleeping at Mrs. Laing's house overnight, while engaged to her daughter, and said a mother would not permit a gentleman so engaged to sleep at her house if she didn't know her daughter was not a virgin, and that *it was an invitation to pass the night in bed with her daughter*; that she had watched in vain to find any element of good in him; that she had not told the depth of the baseness of his character, which letter concluded with an imprecation which will be considered hereafter.

In a letter without date, she reiterated, substantially, the same charges, and added, among others, that he would not know the horrors of remorse, as he had no conscience, being but a wooden man, which also concluded with a malediction which will be hereafter considered.

These letters, in their statements of fact, appear to have been deliberately written, as though she fully

believed in their truth ; yet in respect to her deceased husband's alleged dislike of him, and her depreciation of his character, after December, 1852, it may be said that in a letter of decedent's dated January 25, 1855, she expressed her anxiety for ten days at not hearing from him, and her joy in receiving a letter from him, saying that in her maternal feelings she kissed and hugged the letter but could not read a line of it ; that she sent for his father, and when he saw the handwriting, his cheeks seemed to speak his gratitude for his safety ; signed "affectionately your mother."

His father's letter to him of December 26, 1855, addressed him as his "dear son," stated that his letter to his mother had given him great pleasure, that he had acquitted himself with great credit in an emergency, referring to the strike ; he felt confident he would meet such an emergency, and rejoiced that he had not been disappointed, and that few young men situated as he was would have done so ; and he added that they were proud of their son, and recommended his passing some time in Washington, and concluded "your own loving father."

In another letter of February 4, 1856, he addresses him as "Dear George," recommending his keeping a horse, and suggesting social amusements, recommending him to engage in the zinc works, and in November following he made his will, in the terms already stated.

On the question of decedent's estimate of George, after seeing him at Liverpool in 1852, and thereafter, the following facts appear :

In her letter of December 25, 1855, she acknowledged the receipt of his letter, and that she was paralyzed at the thought of his being in a boarding-house,

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but rejoiced, on reading further, that he was at the New York Hotel, and chided him for his economy, stating that his father was abundantly able to pay all his bills; expressed her thanks that he mingled in society and made the acquaintance of beautiful and graceful girls, that she thought him a comfort to his father, that he was generally talking about him, and happy when he got a letter, and concluded "with much love, I am your affectionate mother."

Another of February, 1856, expressed her opinion that he would prosper in life, and stated that he was aware of her resolve not to influence him in his choice of his profession or of a wife, the latter of the utmost importance, as the other could be changed; saying that he had worked and thought too much the past year, signed, "Your affectionate mother."

In another of February 4, 1856, she complimented him on the cleverness of his letters, and stated that his father agreed with her; that her husband reproached her for writing sharply to him, and said he was an excellent man and felt very proud of him; signed in the same way. One of March 26, 1857, addressed and concluded in the same way, complimented some poetry he had sent her. One of April 23, 1857, in which she spoke of his father's illness, and his thinking of George coming out in the steamer, and that he should act from his own judgment; that they wouldn't be willing to have him in the same steamer with them, and in a postscript that the doctor had seen him and he was doing better, and that he sent his love and said not to consult any one, for he would barely arrive in time, and they would leave as soon as possible, and it was not to be thought of—his

coming out. One on the 27th of the same month, saying the doctor said his father was better.

Another, the next day, saying that she felt he would see his father again in life, but that he was despondent and expressed a desire to be buried in Greenwood, saying, "We must all lie together," and at a later hour, in a postscript, she stated that the doctor had just seen him, and he was better. May 4, 1857, she wrote that he was no better; that Captain Lynes, of the Arago, had called and could tell him how he was; she believed he would recover so as to go to New York during the summer, and that during his illness he regretted that he had not sent for George, to come in the Arago, the last voyage. Another of the 12th of the same month, stating that his father told her to write to him to come on the Arago, and said: "Tell him to get his trunk quick; I want to see him. Why did I change my mind about his coming before."

In a postscript of the next morning, she said that his father was alive, but before he got the letter "it is useless, all will soon end, 'Your mother.'"

One of May 14 said his father was very sick, had a great desire to see him, and hoped he would not fail to come out on the Arago, but to direct him not to leave on any ship after the Arago sailed; she wrote at his request at his bedside, *and that he said he was thinking of him all the time.*

One of May 31, stating that she was about to leave, saying that she had left the Green matter with Mr. Barbe, and asking him, if he stopped in Paris, to see him.

In one of June 1, 1857, addressed and concluded in the same language, she referred to the Green & Co. mat-

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ter, and that Mr. Barbe had it in charge, and had paid her expenses for a fortnight past, and done everything for her, giving the items of expense.

One of September 6, 1857, stating that Mrs. Norrie had been to see her and alarmed her much about his health, making anxious inquiries as to it, and stating that his father said he would go into a consumption if he didn't marry, and asked him not to trifle away his life, asking him to think how happy he would be if married to a refined, educated, well brought-up girl; that no girl who fancied him could refuse him, and it was only occasionally that a young man could be found with so many recommendations, plenty of money, oldest family, best stock of the country, complete schooling, *thorough cultivation, good talents, high principles, morals of new fallen snow, good presence and disposition to make a woman happy*, and that it was his father's prayer that heaven might give him a good wife.

In a letter of September 21, of same year, she spoke of wishing to see him by himself, and that she *could kiss him fifty times at least*, and asked him not to come to the depot, but call at the Astor House at time stated, and in a postscript she urged him not to meet her, but come to the Astor House.

One of October, 1857, requesting George to engage a berth in the upper cabin of Captain Lynes's steamer for "Mrs. Frost of Portsmouth," decedent's assumed name.

In hers of November 28, 1857, she speaks of Mr. Barbe and his opinion of George, that he had never met a young man he thought so much of, and was certain he would become very distinguished, and spoke of her advice and training of him; that his love should be given

to his wife, but approval to herself ; that she thought *if he had a son she would worship him*, and repeated that her husband and herself desired him to marry, and stated that his means were sufficient and only needed delay to find the right person.

In hers of December 7, same year, she stated that if he were with her and she indulged her inclination, she would give him many kisses, and asked him in a post-script to be happy, and said she *had but him to love and think of, until he should have a son and call him N. W. Merrill*.

One of date December 18, same year, stated that his letter comforted her, as bringing kind words from him, and suggested again to get married.

One of December 25, 1857, in which she questioned his authority to make investments for her, and his advice in respect thereto, and his arguing with her about business matters, as a disagreeable habit, and that she could not submit to his dictation, and alluded to financial embarrassment, and desire to know the extent of her income ; that she sometimes thought that she should finish her life abroad, but invoked him to remember his father's dying words, "let us lie together," that she wrote to him when the doctor told her his father would die in three days, it would be useless for him to come, and reproached him for having gone to Havre, and for not coming before, and for writing about matters that did not interest her, and about sending her money.

In a letter of January 3, 1858, she reproached him for not writing matters of interest, and suggested he should send half a sheet of paper directed to her, to save postage, giving him advice about the employment of his time, and

referred to Dr. Harris stating that his fault was want of ambition. In another inclosed without date, she referred to his letters not giving her pleasure to read or him to write. In another she again urged him to marry, and stated that he could never know with what interest *his father looked forward to his grandchildren.*

In a brief note of February 24, 1859, she addressed him as "Mr. George Merrill," and informed him that *if he wished to hold any intercourse with her, he would come to France, and get her signature from Green & Co.'s books, which his hypocrisy caused them to obtain from her,* whereas it appears that he had no agency whatever therein, except in sending a power of attorney to Mr. Barbe and trying to dissuade decedent from the folly of going to Europe, for the purpose of prosecuting the claim.

In a letter of March 2, 1859, she stated she wrote in the bitterness of her soul, that she intended to convey to him the idea that she scorned and despised him, and Mr. Taylor (who had also advised against decedent's going to prosecute the Green claim), and stated she had neither respect or friendship for Barbe, reproached George for putting her in the power of an ignorant Frenchman, and that the first harsh words ever used towards her, were by him, three months after her arrival in New York to bury her husband, and accused him of getting ignorant foreigners to help to control and manage her, and that if he had been less in love with himself, he would have learned from her manner that she despised his hypocrisy and self conceit—referred to her settlement of the legacy with him, given by his father's will—that she was annoyed, at her arrival in June, with the remains of her husband, not

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to find the vault ready—accused him of neglect to send money to her, which he denied, and she repeated the accusation respecting his going to Havre, instead of remaining in New York, to receive her with his father's remains—that *her feelings towards him were most bitter, and that unless her signature was erased from Green & Co.'s books, which would not have been there but for Barbe not attending to business*, according to Mr. Taylor's advice, she would never hold any intercourse with him whatever—that he should never speak of her as his mother—that *her husband died saying Green & Co. had killed him, and she should die saying that he had killed her."*

These statements about the unworthiness of Mr. Barbe, were more than a year after she had commended him to George as a fit person to intrust with the Green matter, and whom she had advised him to consult.

Hers, of February 1, 1860, addressed "Dear George," saying that she had been ill and had been tormented with the thought that perhaps he would not carry out her views in regard to Green & Co., but if he promised to do so *she would believe him, as certainly as the day would follow night—she had unwavering faith in his truthfulness, principles and morals*, and alluded to the probability of contesting her will.

In hers of 15th of same month, she stated that she had been thinking, if there was a probability of his marrying, of *having her face painted for her grandson*, and not for him; *that he had "a very pure if not a warm heart,"* for which she was thankful, and "remarkably tender conscience."

Hers of the 21st of the same month stated that, dur-

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ing her illness, her desire was to say a few words of kindness to him, to live and to tell him that her seeming hardness was to perfect his character ; speaking about being taken ill by the receipt of a letter from Mr. Barbe, charged with twenty-four sous postage, and asked him to transfer \$1,000 from her account to his.

In hers of March 18, same year, she addressed him as "My dear son," and stated that her heart was bursting, not a tear moistened her eye ; charged him, as he valued his soundness of mind, and as he felt the value of health, and love to her, not to dwell upon his rejection, and suggested that Miss Laing belonged to a large class of girls whose sole occupation was to gain admirers, and that she had cause for gratitude that such a girl she was not to have for a daughter, and when she returned to New York she predicted she had read her character from his letter, and asked him to dismiss her from his mind, be strong and manly, and she would be proud of him ; that there had been instances of insanity in her family, caused by disappointed love and grief, and asked him to beware of brooding over his sorrow, to be thankful he was not married, that she felt she was not the woman for him ; she dreaded to receive a letter from him lest his reason had given way, but asked him to make no vow of living for fame, and stated if he desired to come to Europe, she would pay every expense, and closed asking him to "beware of insanity." "Affectionately, your mother."

One of 20th of same month, stated that she had no thought but for him day and night ; that her dreams of insanity were distressing for him ; implored him not to yield to despondency ; that *there was no happiness in*

life for her but for him ; that she had made much effort to keep her senses, sometimes passing weeks not knowing calm ; walked her room at night, with a prayer on her lips that her reason might be spared ; that she fancied his escape would be a blessing ; she had no thought for her own trials, but his occupied and distressed her, night and day.

In hers of March 22, same year, she referred to receiving a letter from him, and falling upon her knees and praying for strength to bear any trial it might bring, and expressed her gratitude that his mind was firm ; that she went to church especially to pray for him, and concluding, "Your anxious, unhappy mother."

In hers of April 2, she again charged him to carry out her views regarding Green & Co., and if she died, to spend the fortune, if necessary, to accomplish it, but accused him of being the occasion of all her trouble, because of intrusting the business to Barbe, and spoke of his unfeeling conduct in allowing her to cross the Atlantic in the winter season, when he knew it would be more than useless.

In one dated February 7, 1861, she addressed him, "Dear George," and referred to the Green & Co. matter ; that the opinion was expressed that she should publish a pamphlet of all that had occurred in her interview with Green & Co., and invoked him to communicate with different bankers and correspondents of that firm, asking him to write to different persons, it being her object to have it known, and tell them how much she had expended in crossing the ocean on that business (though she had specially charged him not to mention

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the subject to any one, and crossed the ocean once under an assumed name to conceal it).

One of June 11, of the same year, thanking him for a letter received, saying the step he had taken was overwhelming, invoking God to watch over him and put it in his mind to come back to her, to receive her blessing and forgive her for everything she had said or done to wound his feelings, concluding "affectionately your mother."

Hers of May 5, 1863, made demand upon him for certain articles of property (which he claims had been given to him), which he had no right to.

Another of December 3, 1863, accused him of lying about a worthless bag; that she yielded all her friends to him, didn't visit any that received him, and owned no acquaintance in common; no one could insult her more than by calling upon her if they acknowledged him; that she had never a particle of affection *for him, from the first day she took him to the present, neither had her husband*; had often talked about it, that he was without gratitude; and speaking of Mr. Jones, that she went to the Chemical Bank, and learned for the first time that he (George) had married, and she removed her account to another bank without delay (Mr. Jones being president of the bank).

The decedent appears on numerous occasions, down to nearly the close of her life, after the marriage of George Merrill, to have expressed and often repeated her dislike, distrust and hatred of George, and her imputation against his integrity and purity of character, and that of his wife, and at times, conversing with gentlemen, accused him, in a broad, vulgar and obscene manner and

language, of having had intercourse with his intended wife ; whenever spoken to of him, and his claims upon her, denied that he was "Merrill," but said that he was "Tibbits," and on occasions suggested that if he had married certain persons named, then he would have been "Merrill," and flew into an ungovernable passion, even when her confidential spiritual adviser spoke of him, and repelled the suggestion that he should be a beneficiary under the will ; leaving no rational doubt that she made her will and codicil offered for probate under the impulse of an apparent *insane delusion* as to his character and conduct, and relation to her and claims upon her bounty.

In her letter of December 4, 1862, and another without date, the substance of which has already been given, she concluded : "*I heartily say, may you become as deaf as your sister is, may you become so blind that you cannot distinguish night from day, may you have every trial, every disease, every affliction that was ever sent upon man ; may I live to see you hung—hung up by your lying tongue, is my unceasing wish ; in conclusion, I give you the curses of her you have called mother for twenty-seven years, and I give you the widow's curses, and I promise you that all I have done for you for a quarter of a century is nothing to the exertion I am now making to have your villainy exposed ; the horrors of remorse you cannot have, for you have no conscience—never—never again do you dare to speak of me or of Mr. Merrill.*"

The apparently purposeless mutilation of decedent's will of 1856. It also appears that decedent had a portrait of George, which she mutilated by cutting out mouth and thumb, and she stated the reason for it, *that*

he had a lying tongue and false pen, and should never be allowed to speak or write again ; and it appears, also, that instead of sending it thus mutilated to George, as evidence of her displeasure, she intrusted it for six years to her relative, Mrs. Salter, wife of Dr. Charles Salter.

This is a very full statement of the facts bearing upon the question of decedent's alleged insane delusion.

If she had taken the notion that George had become indifferent to her wishes, and rebellious against her authority, however unreasonable and untrue, it might have been said that there was some semblance of fact and circumstances to base the suspicion upon, in his marriage against her will, which an imperious disposition and over-jealous nature might have magnified into an unpardonable offense ; but her extravagant and irrational exaggeration of his so-called offense, her apparently sincere imputation of an unworthy and depraved character, of his reprehensible, impure and immoral conduct, her baseless accusation of unworthiness and wickedness and impurity on the part of George and his estimable and accomplished wife, her utterly false and irrational statement that his adopted father from his visit to Liverpool, which appears to have been about 1852, discovered his innate depravity, and thereafter distrusted and disliked him, and refused him his name, and her alleged discovery of his baseness and subsequent dislike of him, all entirely and overwhelmingly disproved by numerous subsequent letters, full of extravagant expressions of confidence in his ability, education, moral purity, and her great pride in his talents and brilliant prospects ; her extraordinary expressions of solicitude for his advancement, and especially for his safety in

respect to the strike at the zinc works, and her anxiety lest his mind should be dethroned by his rejection ; by the frequent conversation with different persons as to their estimate of and affection for him, years after the event which was stated by her as the beginning of their distrust, and especially by the terms of both of their wills, made and executed in 1856, four years after the time mentioned, wherein he was made the ultimate beneficiary by name, as their adopted son, and many other circumstances, which might be recalled.

Taken in conjunction with the foregoing facts and circumstances, her vulgar and false charge, without the remotest foundation, of illicit intercourse between George and his intended wife, the general imputation of unchastity, equally baseless, her diabolical and fiendish imprecations upon George, just referred to, her incoherent and impious curses, her senseless mutilation of her will and his portrait, and the reasons given for it, all combine to show that, if decedent was of sound mind, an intelligent, affectionate, kind, modest, truthful, Christian woman had been transformed into a bold, defiant, passionate, unfeeling, cruel, false, vulgar and obscene fiend incarnate, which cannot be pleaded even as a thoughtless ebullition of intemperate, ungovernable anger and jealousy, for the utterances were oft repeated and rewritten with deliberation at distances from the object of her malediction, with nothing apparently but a distorted brain to account for her transformation so complete and the delusions so marked, which would be a signal mercy to her memory and the fame of her sex, to ascribe it to a *morbid or insane delusion*.

It is of the essence of an *insane delusion*, that as it has

no basis in reason, so it cannot by reason be dispersed. and is thus capable of being cherished side by side with other ideas with which it is rationally inconsistent (*Smith v. Tebbitt*, 16 *Weekly Rep.*, 18).

An insane delusion is not only one which is founded in error, but one in favor of the truth of which there is no evidence, but the clearest evidence often to the contrary. It must be a delusion of such a character that no evidence or argument will have the slightest effect to remove (1 *Redf. Law of Wills*, 86; *Florey v. Florey*, 24 *Ala.*, 241).

In *Stanton v. Wetherwax* (16 *Barb.*, 259), Judge GRIDLEY approves Sir JOHN NICOLLS' definition of insane delusion, as follows: "Whenever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and whenever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently reasoned out of that conception, such a patient is said to be under a delusion, in a peculiar, half technical sense of the term, and the absence or presence of delusion so understood forms in my judgment the only true test or criterion of absent or present insanity." See 1 *Bouvier Dict.*, "Delusion," and cases cited.

In *Clapp v. Fullerton* (34 *N. Y.*, 190), it was held not sufficient to justify the rejection of a will, that a testator, in other respects competent, entertained the mistaken idea that one of his daughters was illegitimate, if it was not the effect of insane delusion, but of slight and inadequate evidence acting upon a jealous and suspicious mind; and Judge REDFIELD, in his treatise, at vol. 1, p. 86, note 22, says that "this is placing the question upon safe ground,

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as a belief, based upon evidence, however slight, is not delusion, which rests on no evidence, but upon mere surmise."

In *Seamen's Friend Society v. Hopper* (33 *N. Y.*, 619), it was held that a person persistently believing supposed facts, which had no real existence, against all evidence and probability, and conducting himself upon the assumption of their existence, was, so far as such facts were concerned, under an insane delusion.

The whole character, deportment and conduct of George Merrill has been conclusively proved to have been a complete refutation of decedent's accusations, which accusations, however, appear to have been confidently believed by her, for it would be an unjust and unwarranted accusation that she knew them to be untrue and yet persisted in charging and acting upon their truth.

Her belief that the Green & Co. matter had killed her husband, and that he said so repeatedly, is against reason, and contradicted by all the probabilities of the case, and the whole character of her husband afforded the most persuasive evidence against the assertion. The education, manners, culture, habits, talents, morals, generous, honorable and manly instincts of George Merrill contradicted all her slanderous and libelous charges against him, and the verbal and written opinions of her husband, and of herself, furnish the most indubitable refutation of her allegations; that neither his adopted father or she ever felt any interest, confidence or affection for him, and in her case, her unvarying statements in her correspondence of about eight years after George had graduated, afford positive proof that she often stated and wrote most obvious falsehoods respecting him, and of her

opinion of and sentiments towards him, so that she believed the untruths, *not only without evidence, but against the cogent arguments which the facts afforded.*

Another feature which it seems to me should have some weight in this inquiry, is that the prejudices, jealousy, vindictiveness and vulgarity of the decedent, did not exhibit themselves as connected with any other matter than her relations to George, his wife, and the Green & Co. matter, and it seems perfectly obvious that the decedent was possessed of a morbid mind upon those subjects, from which there is no evidence that she ever recovered; but on the contrary, whenever her mind rested upon those subjects, a morbid delusion exhibited itself; and I am of the opinion that she entertained them until the execution of her will and codicil propounded, and they constituted the motive and occasion of her change of the terms of her will of 1856, and the disinherison of George.

This brings me to the inquiry whether the insane delusions in respect to George were such as to avoid the will and codicil. Redfield, in his first volume, at page 79, states the rule thus: "Whenever it appears that the will is the direct offspring of partial insanity, or monomania, under which the testator was laboring, it should be regarded as invalid, though his general capacity be unimpeached" (*Boyd v. Eby*, 8 *Watts*, 71; *Tawney v. Long*, 76 *Penn.*, 106; *Dew v. Clark*, 1 *Add.*, 279; 3 *Id.*, 79).

Willard on Executors, at page 8, says, of the latter case, it must be considered as establishing the doctrine that partial insanity will invalidate a will which is fairly inferred to be the direct offspring of that insanity.

In *Waters v. Cullen* (2 *Bradf.*, 354), the will was set aside on the ground of insanity, the testatrix having died of *delirium tremens*, to which she had been subject more or less, for some time before her death ; she gave her property to the children of her first husband, and left those by the last penniless, stating, as the reason, that the property came from her first husband ; it also appeared that she believed that she had been poisoned by the father of the children whom she left unprovided for, and it was held that she labored under an insane delusion in both respects. In *Stanton v. Wetherwax*, above cited, the same doctrine is maintained. See also *Seamen's Friend Society v. Hopper*, above cited.

In *Lathrop v. American Board of Foreign Missions* (67 *Barb.*, 590), the decree of the Surrogate, refusing probate of the instrument propounded on the ground that it was executed under the delusion that his relatives and acquaintances had entered into a conspiracy to rob him of his property, he being a confirmed monomaniac upon the subject of freemasons, and charging that his relatives were freemasons, was affirmed.

In *Lathrop v. Borden* (5 *Hun.*, 580), the same doctrine is maintained ; also in *Clapp v. Fullerton*, above cited (see also *Brick v. Brick*, 66 *N. Y.*, 144 ; *Coit v. Patchen*, 77 *Id.*, 533 ; *Denson v. Beazley*, 34 *Texas*, 191).

In *Gardner v. Lamback* (47 *Ga.*, 133), the charge to the jury, that if the testator was partially insane, and the will was in any way the effect or result of that insanity, it was void, was sustained.

In *Potts v. House* (6 *Ga.*, 324), it was held that if the testator was partially deranged, either as to the legatee or subject matter of his will, he was mentally unsound

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in respect to the particular will, however unimpeachable his capacity in other respects. (See *Lucas v. Parsons*, 24 *Id.*, 640; *Brooke v. Townshend*, 7 *Gill*, 10; *Robinson v. Adams*, 62 *Maine*, 369; *Benoist v. Murrin*, 58 *Mo.*, 307; *Stackhouse v. Horton*, 15 *N. J. Eq.*, 202.)

If the argument of the learned counsel for the residuary legatee in this proceeding was rightly apprehended upon this branch of the case, it was that George Merrill had no claims upon the testatrix's bounty, and therefore any insane delusion as to him would not invalidate the instrument propounded.

Upon the most careful consideration which I have been able to give the elementary treatises and decisions upon the subject, I am not able to find any such distinction enforced or recognized. The fact that George was next of kin of decedent, who would have taken a share of her property in case of intestacy, and had been informally adopted by decedent's husband and recognized by him and the decedent as a son, with the declared intention that he should succeed to their property, and the execution of decedent's will of 1856, by which George became the sole beneficiary, seem to me to establish a claim on the bounty of decedent which cannot be denied, for as next of kin, in the absence of a will, he had a claim upon her bounty, and that claim certainly was not weakened by adoption and treatment as a son, and it is too clear for argument that if the instruments propounded are void for want of mental capacity on the part of the decedent to execute them, then at her death, notwithstanding the execution of them, George became the vested owner of all her property.

Suppose that the decedent, after the execution of her

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will of 1856, had been informed by one of her other relatives that George had died, and in the honest belief of that fact, she made a new will, giving all her property to that relative who had thus deceived her, would there be any doubt that George, by virtue of the former will, had such claims upon the decedent as to entitle him to contest the later will, and to allege that it was made under fraudulent representations, and therefore void, and that fact being established, is it not manifest that it would revive the former will, and thus vest in the contestant all his rights?*

Indeed, I am inclined to the opinion that if George had been an entire stranger to the decedent, and under an insane delusion she had changed her will, which had given him her property, to his disinherison, that insane delusion would avoid the latter instrument and revive the former.

I am not able to understand why a will made by an insane person should be invalidated, when it deprives a near relative of an expected bounty, and *validated*, when it deprives a remote relative of a like bounty, for it is the *insanity* which avoids the act, and if the will clearly appears to have been executed under an *insane delusion*, it would be equally void as if executed by one who was a confirmed lunatic or utterly demented, and George, if a stranger, could contest the will thus made, because of his rights under the former will.

See *Walsh v. Ryan* (1 *Brad.*, 433), where it was held that it was competent for a legatee under a will to oppose

* Subsequently to this decision, an action was brought, in the supreme court, to establish the will of 1856, and a judgment recovered in plaintiff's favor, in 1882.

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the proof of a codicil, which purported to revoke his legacy given by the will.

In *Gombault v. Public Administrator* (4 *Brad.*, 226), it was held that the public administrator might intervene to contest the probate of a will as to the personal estate, and the attorney-general as to the realty.

I can conceive no logic which would validate a will executed as the offspring of an *insane delusion*, and the only significance that the relationship of the parties contesting, as the subject of the insane delusion, can have, is in determining whether the will was the offspring of the particular delusion alleged.

I am fully aware of the fact that the setting aside or rejection of a will is the exercise of a very radical judicial prerogative, and that it should not be exercised except upon very satisfactory proofs. But if I am right in holding that decedent made the will and codicil offered for probate, under a delusion as to the character and conduct of George Merrill, and that delusion was such as the law adjudges *insane*, *the will and codicil must be refused probate*. This latter conclusion renders it unnecessary to consider the point raised as to the provisions in behalf of Cardinal McCloskey, being in fact in trust for the benefit of "religious or missionary societies or corporations."

The instruments propounded should be refused probate because they were executed by the decedent when laboring under an *insane delusion*, the same being the direct offspring of such delusion.

Let a decree be entered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SUREGATE.—
July, 1881.

BURMESTER v. ORTH.

In the matter of the application for letters of guardianship of LORENZ ORTH, an infant.

Where the mother, and also a friend of the deceased father, of an infant of ten years, entitled to a small estate, petitioned separately for the guardianship of his person and property, and it appeared that the infant had, for three years, resided with, and been cared for by the latter petitioner, to whom the father had informally intrusted him; that the father had been for several years separated from his wife, for her fault; and that she was engaged in a disreputable business, while the other petitioner was a suitable person,—*Held*, that the mother's petition should be denied, and the other granted.

It seems, that the declared wishes of the deceased father of an infant of tender years, as to his custody, should, in the absence of a testamentary disposition, have little weight against the lawful claims of the mother; who, if a suitable person, and able to maintain and educate the infant, is entitled to the guardianship.

APPLICATION for letters of guardianship of an infant's property and person.

Charles Burmester, on July 10, petitioned for letters of guardianship of the person and estate of the infant, as his next friend, setting forth that he had resided with petitioner for the past three years; that his father was dead, and his nearest relative was his mother, Mina Orth; that he was entitled to \$1,000, personal property, and was of the age of ten years. Wilhelmina Orth, the mother, on July 25, filed a like petition, alleging that the infant was nine years of age, and that his nearest relative in New York was petitioner, and that he was entitled to \$1,000, etc.

These two petitions being presented, and charges

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being made against the mother, a reference was ordered to take testimony, and the referee filed his report with the testimony, which established, substantially, that the petitioner, Burmester, was a married man, having no living children, and keeping a lager beer saloon; that the infant had resided with him for over three years, its father having died May 9, 1881, after being for several years separated from his wife, the infant's mother; that the father, in his life-time, informally committed the custody and care of the child to the petitioner, who had since cared for him, and sent him to school; that the petitioner and the deceased father of the infant were members of a German organization called "Order Germania," under whose charter the minor in question was entitled to \$1,000, on the death of the father.

The infant, being examined without oath before the referee, stated that he had lived with the petitioner over three years, and liked him and his wife, who treated him kindly; and wanted to stay with them, and did not want to go home to his mother, for the reason that she was living with a man, which she did before the death of his father; that he had been to a saloon kept by his mother, in the Bowery, and when he told his father, he refused to allow him to go again; that his mother, in 1880 and 1881, told him that she was living with a man; that he had run away from his mother in the street, one day, because he was afraid she would take him; that his mother told the principal of the school where he attended, that her husband was a bad man, and that Burmester was stealing his property.

It further appeared that the German-American sharpshooting society, of which the father was a member, paid

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for his burial, and passed a resolution requesting the Surrogate to appoint Burmester guardian of the infant, and declaring he was a competent and upright man, which was established by the testimony of several reputable witnesses ; that the mother of the child was engaged in keeping a concert saloon in the Bowery, the resort of disreputable characters, and where several girls of doubtful reputation served the customers, and that the husband, about the time he separated from her, accused her of going to Philadelphia with a strange man, whom she swindled ; and a witness testified that she had so gone, and on being reproached therefor, answered that it was nobody's business, and that afterwards her husband left her. The mother, however, testified that she did not keep the concert saloon mentioned, but a lager beer saloon, and that she worked several years ago, with the knowledge of her husband, in a concert saloon ; that she was not living with a man, as stated by the minor, and that she did not have women waiters in her saloon ; but she did not deny that she went to Philadelphia with another man, and was gone several days, and that that was the occasion of her husband leaving her ; and the evidence proved that she was engaged in a disreputable business, and kept a disreputable house.

ALFRED STECKLER, *for petitioner Burmester.*

THE SURROGATE.—It is obvious that the mother, being a suitable person, able to maintain and educate her minor child, on the death of the father, is entitled to the guardianship of the minor, for the reason that the law presumes that she has such an affection for, and interest in, her child, as would prompt her to the best

care for its welfare ; but that presumption seems to be entirely overcome in this case.

I am aware that to discriminate against a parent, in the appointment of a guardian for a minor, is the exercise of a very delicate and high prerogative on the part of a judicial officer, and yet it is the performance of a very obvious duty, where it is apparent that the welfare of the minor will be thus best subserved.

It is also a most distasteful necessity to find a mother unworthy of the nurture and education of her child ; but after a careful consideration of the testimony in this matter, it would, in my opinion, be a most reprehensible disregard of the true interests of this minor to confide his maintenance and culture to such a mother, and to the evil and contaminating influences of her immoral example and vicious surroundings, compared with which, complete orphanage and dependence upon the so-called "cold charities of the world" would seem to be a most welcome deliverance. But in this case, fortunately, the father seems to have appreciated the danger likely to befall his child, and to have intrusted his care to an industrious, worthy, kind-hearted citizen and friend, who seems, thus far, wisely and considerately to have performed the duty and the kindly offices of a worthy guardian, and who has manifested his respect for the wishes of his deceased friend, in sheltering and protecting his helpless offspring, and who now generously offers to assume the legal obligation of guardian, prudently to administer the bounty of a praiseworthy charity, provided by the father for the benefit of his son.

In *Bennett v. Byrne* (2 *Barb. Ch.*, 216), and *Underhill v. Dennis* (9 *Paige*, 202), it is held that the declared

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wishes of the deceased parents of an infant, in respect to the manner in which he should be brought up, and to whose care he should be committed during his infancy, are entitled to much weight, in deciding upon the claims of the different relatives to the guardianship of the infant; and while I should pay but little regard to such an expression by the father, as against the lawful claims of the mother, unless the father's wish took the form of a testamentary disposition of the infant, yet in a case where the mother appears to be unfit for the office, I am of the opinion that this court may, with great propriety, give special weight to the expressed wishes and acts of the deceased father, in respect to the custody and support of his infant son, especially as all the evidence shows that the choice of the father was wisely and prudently made.

I am, therefore, of the opinion that the petition for letters of guardianship by Charles Burmester should be granted, and letters issued to him, according to the prayer of his petition, on his giving the usual bond in the sum of \$2,000, and that the petition of the mother should be dismissed.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
September, 1881.

ROOSEVELT v. ROOSEVELT.*

In the matter of the final accounting of JAMES A. ROOSEVELT, sole surviving executor, etc., of JAMES I. ROOSEVELT, deceased.

The testator, at his death, owned a judgment of foreclosure, for more than \$8,000, and a mortgage, on which \$5,700 was due. On a sale, under the judgment, the executor bid in the premises, and afterwards sold them for \$7,500, and, on foreclosure of the mortgage, he received, as net proceeds of sale, \$6,100. Upon a question between life-tenant and remainder-man, interested under the will in these funds, as to the proper apportionment, and the rate of interest to be employed in the calculation,—*Held*,

1. That, in the absence of any rule in this country as to interest rate, five per cent. should be adopted, in analogy to the English rule of three per cent.
2. That a principal sum, which, with interest from the testator's death to date of realization, would produce the amount realized, should be carried to capital account, and the residue to income.

MOTION to confirm referee's report on final accounting of executor; opposed by Charles Y. Roosevelt, a son of testator, and a tenant for life under his will.

The contestant's exceptions raised the questions upon what principle certain amounts, received by the executor upon two of the securities held by him, should be apportioned as between a life tenant and remainder-man, or the capital and income of the estate; and on what rate of interest the calculation should be based.

One of the assets referred to was a judgment of foreclosure and sale, known as the Tilton judgment, on which

* See *Scovel v. Roosevelt*, *ante*, p. 121.

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there was due the testator, at the time of his death, April 5, 1875, the sum of \$8,595.22. On foreclosure, the executor bid in the premises, and subsequently, on March 19, 1878, sold them, realizing a net amount of \$7,530.15, which he carried to the account of principal, the life tenants receiving no income until the receipt of the proceeds of the sale,—nearly three years. The other asset was the bond and mortgage of one Juliana Gardner, on which there was due, at the testator's death, \$5,711.66. On foreclosure, the executor received, on February 20, 1878, as net proceeds, the sum of \$6,147.91, of which \$5,711.66, being the amount due thereon at testator's death, was carried to capital account, and \$436.25, the surplus over the amount then due, to income account.

The referee reported that the amounts so received should be apportioned, as between capital and income, according to the following rule: "A principal sum is to be ascertained by computation, which would produce, with interest at the rate of five per cent., from the death of the testator, down to the time the proceeds were actually received, the amount so received, and such principal sum is to be carried to capital account, and the residue, being the five per cent. interest, to the account of income;" that, as to the Tilton judgment, according to such apportionment, of the said sum of \$7,530.15, there should be carried to capital account the sum of \$6,560.68, and to account of income \$969.47; and that, as to the Gardner mortgage, of the said sum of \$6,147.91 there should be carried to capital account the sum of \$5,375.22, and to the account of income the sum of \$772.69.

To this rule, and said rate of interest, the contestant excepted, claiming that, as to the rate of interest, the ref-

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eree should have adopted seven per cent. to January 1, 1880, and six per cent. from that date to the date of accounting.

DE WIT, LOCKMAN & KIP, *for executor.*

KURZMAN & YEAMAN, *for exceptant.*

THE SURROGATE.—The natural first impression, in considering this case, was to ascertain the amount of loss of principal and of interest, by a computation of interest upon the amount due to the decedent at his death upon the respective obligations referred to, deduct the amount realized from the principal and interest thus computed, and charge to the respective beneficiaries the amount of the loss, in proportion to their interests, respectively, so ascertained. But a moment's reflection showed that that was an erroneous basis, for the reason that the amount due at the death was not realized, and therefore was not a proper statement of the remainder-man's interest. Hence, it becomes necessary to adopt some rule, by which it can be ascertained what the equitable proportion of the loss sustained is. The rule in England, stated in *Cox v. Cox* (*L. R.*, 8 *Eq. Cas.*, 343), and adopted by the referee, which rule, it is supposed, was evolved from the necessity of the case, seems to be the only one by which to approximate the relative liability of the life tenant and remainder-man, to sustain the loss. In that case, the vice-chancellor computed the interest, in ascertaining the principal, at four per cent., the current rate in England then being five per cent.

The only other question which seems necessary to be discussed is, what should be the rate of interest computation, in the effort to ascertain the remainder-man's inter-

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est in the fund realized. The rule adopted in *Williamson v. Williamson* (6 *Paige*, 298), was to make the computation at five per cent., in analogy to the rule in England of three per cent., in cases between legatees for life and remainder-men, so as to apportion the capital and income between them, although the reason for this reduction is not stated. It is supposed to be based upon the fact that suitable investments cannot be always promptly made, at the highest legal rate of interest, and that it would be unjust to the remainder-man to adopt the highest rate in such computation. In the absence of any rule upon the subject in this country, and respecting the authority of the English vice-chancellor, and the experience and learning of the referee, and regarding the rule adopted as consonant with the principles of equity, I am of the opinion that the report of the referee should be confirmed and the exceptions overruled.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SUREGATE.—
October, 1881.

LEIDENTHAL v. CORRELL.

In the matter of the final accounting of FREDERICK CORRELL and JULIANNA CORRELL, administrator and administratrix, etc., of FREDERICK CORRELL, deceased.

The widow of decedent received, from benevolent societies of which he was a member, certain sums, the intended disposition of which was

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indicated by their respective by-laws, etc., as follows: (1) from the death aid fund of Battery B, \$150, "to be paid, on the death of a member, to the legal relatives;" (2) from Germania Lodge, \$100, "a funeral money, to be paid, on the death of a brother, to his widow, children, survivors, administrators, heirs or such others as shall be entitled thereto;" (3) from Central Aid Association, \$200, "to be received, on the death of a member, by those entitled to inherit, either under the will or by blood relationship (or the surplus, where the association has paid the funeral expenses);" (4) from Mount Horeb Camp, \$100, "to defray the funeral expenses." The widow, also the administratrix, on her accounting, charged the estate with \$218.10, the funeral expenses, but credited it with none of these sums.

Held, that the manifest purpose of the last three donations was to defray the funeral expenses, and that the widow, having received more than the amount of those expenses, could not charge the same against the estate; but that the excess, beyond those expenses, did not belong to the estate of decedent, and the personal representatives were not accountable, in the surrogate's court, therefor.

MOTION to confirm referee's report on administrator's final accounting; opposed by Louisa Leidenthal, and others, children of decedent.

The only questions submitted for determination were as to the disposition of the various sums received by the widow of decedent, from benevolent societies of which the decedent was a member. She received from the death aid fund of "Battery B," \$150; from Germania Lodge, No. 13, \$100; from the Central Aid Association of I. O. O. F., \$200; from Mount Horeb Camp, \$100:—in all, \$550. Further facts sufficiently appear in the opinion.

M. C. GROSS, *for administrators.*

E. P. SCHELL, *for objectors.*

THE SURROGATE.—As to the \$150, received by the widow as the death aid fund of Battery B, article 5 provides that, on the death of a member, there shall be paid to the legal relatives the sum of \$150. It is clear to my

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mind that this fund did not belong to decedent or his estate, and that the administrators, who are the administrators of the goods, chattels and credits of the decedent only, received the fund not as administrators, but for the benefit of the legal relatives of the decedent, and are therefore not accountable in this court therefor. It is probable that the term, legal relatives, should be held to mean widow and next of kin, but it seems to me too clear for argument that this court's jurisdiction over an accounting is with the representatives of the estate of a deceased person, in respect to such estate. Hence, the accounting administrators cannot be required to account in this proceeding for the \$150, so received.

As to the \$100, received from Germania Lodge, No. 13, the report of the referee finds that the widow received it, but that she has given no credit for it, though she has charged the estate with the payment of \$218.10 for funeral expenses. By the by-laws, it is provided that, on the death of a brother, there shall be paid to his widow, children, survivors, administrators, heirs or such others as shall be entitled thereto, a funeral money of \$100. Having received this money and charged the estate with funeral expenses, I am of the opinion that her charge for funeral expenses should be reduced \$100, or, what will practically produce the same result, that she should be charged with the \$100.

As to the \$100, received from Mount Horeb Camp, the by-laws provide that the widow or adult heirs of a deceased member shall be paid \$100, to defray the funeral expenses. The widow, having received this fund, should have devoted the same to that purpose, instead of using the funds of the estate therefor. Her charge for funeral

expenses should be reduced by that amount, or she charged therewith as assets on hand.

As to the \$200, received from the Central Aid Association, the constitution provides that those entitled to inherit, either under a will, or by blood relationship, shall receive \$200 on the death of a member, and, in case the funeral expenses have been defrayed by the association, the surplus remaining. The term, blood relationship, doubtless refers to next of kin, including the widow, and the provision just referred to is the only one of the latter three that indicates that the survivors are to have any right in the fund, except for funeral expenses. I am therefore of the opinion that, as to the balance of the charge for funeral expenses, they are properly covered by the \$200, and that it was, therefore, the duty of the administrator to have paid the full funeral expenses out of the funds received for the purpose, and, as to the balance of this \$200, it is not property of the estate, and the administrators cannot be required to account therefor in this proceeding, for the reasons stated respecting the sum received from the death aid fund of Battery B.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
October, 1881.

HEWITT v. HEWITT.*

*In the matter of the probate of a paper propounded as
the last will of EDWARD HEWITT, deceased.*

The instrument propounded as decedent's will was an irregular piece of coarse brown paper, measuring ten by seven inches, written partly with a blue, and partly with a black pencil. Upon the first page was a disposing clause, followed, at the foot, by the names of two witnesses. The paper appeared then to have been folded sidewise, thus forming a second page, upon which were written, in the order given, the names of the same two witnesses, another disposing clause, the decedent's signature, a statement of a reason for the dispositions, and the decedent's signature, again. The names of the witnesses could not be made to appear as subscribed at the end of the will, by any system of folding.

Held, that the instrument should be refused probate, on inspection, on the ground that the attesting witnesses did not sign their names at the end thereof.

Where a fatal defect is patent upon the face of a paper, offered for probate as a last will, it may be rejected without entering upon formal proof.

The words "at the end of the will," in 2 R. S., 63, § 40, subd. 4, relating to the signatures of attesting witnesses to a will, refer to place, and not to time.

The requirement of the statute, that the witnesses shall sign, *at the end of the will*, is as obligatory as the corresponding provision relating to subscription by the testator.

The doctrine that one requirement may be so complied with, as to include compliance with another, has no application to such a case.

Hitchcock v. Thompson, 6 Hun, 279,—doubted.

APPLICATION for the probate of a will, by Thomas Hewitt, a legatee therein named; opposed by Minnie Hewitt, widow of decedent. The document propounded was a coarse piece of brown paper, of irregular shape and

* Subsequently affirmed, at general term, on the Surrogate's opinion.

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jagged edges, about ten inches long and seven broad, written partly with a blue, and partly with a black, pencil, claimed to be in the handwriting of the decedent, and reading thus :

"I, Edw. Hewitt bequest to my Brother Thomas $\frac{1}{2}$ of all Patents, the other half to go to my two children Jessie and Harry Hewitt, to" (*the foregoing in blue pencil, the rest in black, as follows :*) "be held in trust of Mr. Hake until my children is of age.

MARY HEWITT, witness,

TH. CASSELMANN, witness."

Here ended the first page, when the paper appeared to have been turned over sidewise, and at the top appeared "Mary Hewitt, witness. Th. Casselmann, witness." Under these names, was drawn a pencil line, after which was written the following :

"My other patents which I have applied for to go to my brother Thomas Hewitt.

EDW. HEWITT."

(Then follows :) "my reason for doing this is my wife has been false to me & Broke my heart by not doing right.

EDW. HEWITT."

The names of the witnesses thus appeared to be signed twice, once at the bottom of the first page, and again at the top of the second ; but in each instance, between the provisions disposing of decedent's patents, one-half to his brother, and one-half in trust to Mr. Hake for his children, and the disposition of his patents applied for, to his brother Thomas.

The names of the witnesses could not be made to appear to have been subscribed at the end of the will, by any possible system of folding. Counsel for the contestant, after filing objections to the probate, on the ground, among others, that the witnesses did not sign their names at the end of the will, moved that the instrument be denied probate for that reason, on the inspection of the paper.

Proponent's counsel opposed the motion, on the ground that the proponent was entitled to produce and examine his witnesses, in order to enable him to show the circumstances and manner of execution, and the time when the witnesses signed, and urged that the place of signature was immaterial, if it should appear that they signed after the will had been completely drawn and the decedent had subscribed the same.

J. K. FURLONG, *for proponent.*

TEN Eyck & REMINGTON, *for contestant.*

THE SURROGATE.—As there is no question of the identity of the instrument propounded, I am of the opinion that, if there is a fatal defect, patent upon the paper, which cannot be cured by averment or proof, the court is not required to enter upon a formal proof of the instrument, but should reject it at once; otherwise an instrument without witnesses, or with but one, or which had not been subscribed by the decedent, might engage the valuable time of the court, in order to enable the parties to prove what is patent upon the face of the instrument.

This brings me to the inquiry whether the fourth requirement of 3 R. S., 63, § 38 (6 ed.), that there shall be

at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, can be dispensed with. The proponent's counsel cites the case of *Hitchcock v. Thompson* (6 *Hun*, 279), which held that a will drawn upon one sheet of paper, fastened together at the end, only the first and third pages being written on, the second page being left blank, signed by the testator at the bottom of the third page or end of the will, the attestation clause being placed at the top of the second page, signed by the witnesses, was properly executed, and should have been admitted. Judge BARNARD, in giving the opinion of the court, said it was a mere question of folding the paper ; that there was no fraud ; that the will was, in point of fact, attested after its execution by the testator, *at the end of the will*. The attestation of the witnesses was not at the end of the will, and there was no process of folding by which the attestation could be brought at the end of the will. But, on the contrary, whatever mode of folding might have been adopted, the attestation would invariably appear to be between the first and the second page of the written will, and not at the end of the will, unless the learned judge intended to interpret the end of the will as expressive of the time when it was attested, which is inconceivable.

I see no reason suggested by the statute, why the requirement, that the subscribing witnesses shall sign their names at the end of the will, is less obligatory than that requiring the testator to subscribe at the end of the will. Although it is possible to suppose that the omission in the first might afford greater opportunities for fraud than the other, for if the signature were at the top or in the middle of the instrument, there would be

afforded a greater opportunity for the fraudulent insertion of other provisions not known to the testator.

But the court has no right to assume that the one requirement is less obligatory than the other, or the omission of it less fatal to the legality of the instrument, and in that case it is clear that the witnesses had no idea what they were to attest, for they appear to have subscribed the first page of the instrument, without any subscription of it by the decedent, and the signatures, as made, afford no evidence that they were not made before the writing of that portion of the will written on the second page, and do not appear to have been made with any reference to the decedent's signature.

Suppose the subscribing witnesses were both deceased, and an effort were made to prove the will by proving the signatures of the subscribing witnesses and the decedent,—in the absence of an attestation clause, there would seem to be no ground for presuming that their signatures were made after the will was executed by the decedent. If such a signing can be held a compliance with the statute, then a signing by the witnesses, at the top or on the margin, or intermediate two clauses of the instrument, would be sufficient.

In *Sisters of Charity v. Kelly* (67 *N. Y.*, 409), it was held that the expression in the statute, "at the end of the will" meant the end of the instrument as a completed whole, and where the name was written in the body of the instrument, with any material portion following the signature, it was not properly subscribed. In that case, the testator's name appeared in the middle of the clause appointing the executors.

In *Baskin v. Baskin* (36 *N. Y.*, 416), Mr. Justice

PARKER, after stating the four requirements of the statute for the due execution of a last will and testament, says that none of these requisites can be dispensed with, and without a substantial compliance with them all, the will cannot be admitted to probate.

In *Remsen v. Brinckerhoff* (26 *Wend.*, 331), Chief Justice NELSON, after stating the four requisites, says that it is obvious that any one of these four requisites, in contemplation of the statute, is to be deemed as essential as another; that there must be a concurrence of all, to give validity to the act; and that the omission of either is fatal.

In *M'Guire v. Kerr* (2 *Bradf.*, 244), it was held that the statute, requiring a will to be signed by the testator and the witnesses at the end, demanded that they should agree as to what the end of the will was, and the will was rejected because the testatrix signed in one place, after which executors were appointed by a clause to which the names of the witnesses were signed; after which another provision was written, to which the testatrix put her name, the witnesses and testatrix in no instance coinciding as to where the end of the will was.

Judge BRADFORD says that the testator and the witnesses must all unite in authenticating the instrument at its point of completion.

In *Lewis v. Lewis* (11 *N. Y.*, 220), Mr. Justice ALLEN says that the legislature have made four things essential to the proper execution and attestation of a will, and a want of conformity to any of the requisites will invalidate the instrument as a testament.

It is true that, in the case of *Baskin v. Baskin*, above cited, it was held that the testator, who produced a

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paper bearing his personal signature, declared it to be his last will and testament, and requested the witnesses to attest it, acknowledged its subscription within the meaning of the statute, upon the ground that the presentation of the paper to the witnesses for attestation, and publishing it so subscribed as his will, was an unequivocal acknowledgment of the signature thus affixed, and that it was a substantial compliance with the statute prescribing the formalities to be observed in the execution of wills. See, also, *Gilbert v. Knox* (52 N. Y., 125).

By this is meant that if, in the performance of one requirement, it is so done as to include that prescribed in another, it is substantial and sufficient. But that doctrine has no application to the case under consideration. For the signing by the witnesses, at the end of the will, is an independent provision which is not aided by the performance of all the other requirements. Neither the signing in the presence of the witnesses at the end of the will, by the testator, his acknowledgment of his signature, his publication of the instrument as his last will and testament, his request to the witnesses to sign, nor their signing in his presence, in any way aids in a compliance with the positive requirement that they shall sign their names at the end of the will.

The admission of the will, in *Hitchcock v. Thompson*, above cited, may perhaps be sustained, though *this* will should be rejected, because the cases are quite dissimilar. But, as the conclusion which I have reached in this case may seem to be at variance with the reasoning of the learned judge in that case, I have deemed it proper to state the authorities upon which the conclusion is based.

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I am of the opinion that the instrument propounded should be rejected, for the reason that the attesting witnesses did not sign their names at the end thereof.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
November, 1881.

RICHARDS v. MOORE.

*In the matter of the probate of the will of JOHN P.
MOORE, deceased.*

The testator, by the first clause of his will, directed his debts, etc., to be paid. By the second, he gave to his wife the net income of all his property, for life; the same, after her death, to three children, in equal shares, for life; the principal, after their death, to grandchildren. By the third, he gave certain legacies, payable out of the income. By the fourth, he nominated "trustees" to carry his will into effect, without liability to give security. On an application for construction, etc., of the will, as respects personal property,—*Held*,

1. That so much of the second clause as suspended the absolute ownership of property, was void, under 1 *R. S.*, 778, § 1, as effecting such suspension for more than two lives in being at the testator's death.
2. That so much of the same clause as bequeathed income to the wife for life, was inseparable from the illegal portion, and fell with it; not being a separate, valid trust, nor unessential to the general scheme of the will.
3. That the remainder of the will, including the bequests contained in the third clause, was valid; and that, in other respects, the decedent died intestate.
4. That the language of the will showed an intent to confer, upon the persons named as trustees, the functions, also, of executors, and that the use of the former term, only, was to be deemed an inadvertence.

Van Schuyver v. Mulford, 59 *N. Y.*, 426; and *Manice v. Manice*, 48 *Id.*, 303,—distinguished.

APPLICATION for a determination of the validity, con-

struction, and effect of the disposition of decedent's personal property, as contained in his will, propounded by George G. Moore, one of the executors.

The first clause of the will directed the payment of debts and funeral expenses. The second was as follows: "I give, devise, and bequeath to my beloved wife, Eliza Jane Moore, the whole of the income that may be received from both my real and personal property of every kind, and direct that she shall pay, or cause to be paid, out of said income, all taxes, assessments and repairs that may be necessary to keep said property as productive as possible and free from debt, and that she shall have the use of said net income as long as she shall live, together with the use of my dwelling-house and lot, known as No. 124 Madison Avenue, in the city of New York, together with all the furniture, silver plate, pictures, books, and all articles appertaining to my dwelling-house, for and during her natural life; and after her decease, that then said house shall be rented, and the whole of the income, after deducting all taxes and assessments and repairs, and any other expenses that may be necessary to secure said net income, shall be divided, share and share alike, between my son, George G. Moore, and my daughters, Hannah H. Moore and Elizabeth G. Moore, for and during their natural lives; and after their decease, then the whole of the property, real and personal, shall be divided, share and share alike, among all my grandchildren that may then be living."

By the third clause, decedent gave pecuniary legacies to each of his grandchildren "in lieu of sharing in the income," and certain other pecuniary legacies; all payable "out of the income, as soon as may be convenient."

By the fourth clause, he nominated trustees to carry his will into effect.

John P. M. Richards, one of the next of kin, and the special guardian of certain infant next of kin, expressly put in issue the validity, construction and effect of the disposition of the personal property of decedent contained in the will, pursuant to section 2624 of the Code.

The questions for consideration were whether there was an unlawful suspension of the ownership of the personal property, attempted to be disposed of by the will, and if so, what was the effect of such unlawful suspension upon the other provisions of the will, and how the property thus attempted to be disposed of was to be distributed.

ROE & MACKLIN, *for proponent.*

FORBES & SAGE, *for J. P. M. Richards.*

CHARLES J. BRECK, *for infant legatees.*

THE SURROGATE.—The terms of the will are somewhat peculiar and indefinite. By the second clause, there is a bequest to the widow of the whole income of the personal property, after the payment of debts and funeral expenses, with direction that she pay taxes, etc., including the use of furniture, etc., and, after her death, the net income thereof to be equally divided between testator's son George, and his two daughters, Hannah and Elizabeth, during their lives, when the property is to be divided between his then living grandchildren.

By the next clause, he bequeaths legacies to several of his grandchildren named, in lieu of their sharing in the income, and to certain other legatees named ; to be

paid out of the income, as soon as convenient ; and provides that if any of his heirs, entitled to any portion of his property, shall attempt to break his will, they shall forfeit all claim to his property, except \$100 each.

By the next clause, he appoints trustees to carry into effect the will, without liability to give security, with power to appoint their successors, who shall give security.

It is clear that the provision for the payment of the income to the widow for life, then to the son and two daughters named, is a suspension of the absolute ownership of personal property, for more than two lives in being at the death of the testator, and is obnoxious to 2 *R. S.*, 1167 [6 ed.], § 1 (see *Amory v. Lord*, 9 *N. Y.*, 403 ; *Van Schuyver v. Mulford*, 59 *N. Y.*, 426 ; *Knox v. Jones*, 47 *Id.*, 389 ; *Manice v. Manice*, 43 *Id.*, 303). Numerous other authorities might be cited, but the unlawful suspension seems to be conceded by all the parties.

The next and more difficult question is, whether the bequest of the income to the wife can be sustained by a severance from the subsequent unlawful suspension, on the ground either that it does not come within the purview of 2 *R. S.*, 1101 (6 ed.), § 14, and *Id.*, 1167, § 2, because not a future estate, or that it is severable, and to validate it would not interfere with the general scheme of the will.

I am of the opinion that the statute applies to present as well as future estates (*Coster v. Lorillard*, 14 *Wend.*, 265 ; *Thompson v. Clendening*, 1 *Sandf. Ch.*, 387 ; *Yates v. Yates*, 9 *Barb.*, 324 ; *Amory v. Lord*, above cited). The phrase "suspension of absolute ownership," used in the statute in relation to personal property, is

synonymous in signification with "suspension of the power of alienation" (*Emmons v. Cairns*, 3 *Barb.*, 243; *Morton v. Morton*, 8 *Id.*, 18). I am also of the opinion that the bequest to the widow for life cannot be sustained for two reasons: *first*, because it constitutes a part of the same trust created by the same clause of the will, as the subsequently conceded void trusts (*Knox v. Jones*, 47 *N. Y.*, 389); *second*, because it cannot be brought within the case of *Van Schuyver v. Mulford*, as a separate valid trust, nor of *Manice v. Manice*, as not essential to the testator's general scheme, which was obviously not only to provide the income for his wife, but that that should be her sole interest in his estate, as evidenced by the fact that all the rest of his estate, after her use and at her death, should go to others. And to hold that the provision in her behalf is valid, and the subsequent provisions for his children and grandchildren, as life tenants and remainder-men, are void, would result in the intestacy of the estate so attempted to be disposed of, and thereby materially change the scheme of the will, by letting in the widow to claim a third of the personal estate remaining after the payment of debts and valid legacies (see *Sink v. Sink*, 53 *How. Pr.*, 400; *Edsall v. Waterbury*, 2 *Redf.*, 48).

The next question needing consideration is whether the other provisions of the will may stand, and what will be the character of the rights of the trustees named in the will.

I am of the opinion that the general legacies mentioned in the third clause of the will are valid, and that the persons named as trustees in the fourth clause are made executors as well as trustees; that naming them trustees

was an inadvertence ; that the purpose for which they are appointed—"to carry into effect this my will," and providing that they should not give security, indicate an intention to confer upon them the functions of executors, for the first provision of the will is that the decedent's debts and funeral expenses shall be paid as soon after his decease as convenient, which are duties specially pertaining to the office of executor (1 *Wms. on Ex'rs.*, 196 ; *Redf. Prac.* [2 ed.], 425 ; *Willard on Ex'rs.*, 138 ; *Wood v. Wood*, 5 *Paige*, 596).

The result of the best consideration I have been able to give this matter is that the will in question, so far as it attempts to dispose of the income of the personal estate of the decedent to his widow, son and daughters for life, remainder to his grandchildren, is void ; and that the remainder of the will should be held valid, the trust to be executed by the persons named as executors and trustees ; and that, as to the balance of the estate so undisposed of, the decedent died intestate.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—
November, 1881.

DICKIE v. VAN VLECK.

*In the matter of the probate of the will of PATRICK
DICKIE, deceased.*

The instrument propounded was executed in 1871. A week or two before its execution, decedent called upon the lawyer who drew the will, and who knew nothing of his property, his family, or his testamentary purpose; gave him instructions, with intelligence and coherence, as to its provisions; made an appointment for an interview at decedent's house, which was had, and at which a draft of the will was left for examination; and afterwards came to the office of the drawer, and executed it. The will, itself, evinced an intelligent understanding of its terms, on the part of decedent, and a knowledge of the claims of the members of his family upon his bounty; but the testimony was conflicting as to his conversation and conduct before, during and after 1871. A few weeks after the execution, he wrote a letter to his son in Europe, for the most part intelligent and coherent, yet containing an unreasonable and unintelligible suggestion upon a single topic. In 1870, he manifested certain delusions, which, however, it appeared, were due to illness, from which he recovered. In 1871 and 1872, the evidence showed that he had a clear understanding of the character and value of his property, as exhibited by his statements to his agents, employed to manage the same; by intelligent accounts kept with those with whom he dealt; by employing workmen to repair his houses, and paying them according to contract, and in other ways. In 1874, he was adjudged a lunatic. He died in 1877, aged eighty-four years.

Held, that,—even conceding that decedent was of impaired mental capacity and that, therefore, more than proof of formal execution was necessary to show that the alleged execution was his intelligent and deliberate act,—such additional proof was abundantly furnished by the evidence; that, upon the whole case, he must be deemed to have been of sound mind at the time of the execution, and that the petition for probate should be granted.

The rule, in *DeLafield v. Parish*, 25 N. Y., 9,—concerning the burden of proof of testamentary capacity,—explained.

Medical experts on insanity,—reviewed.

The testator, by his will, gave the residue of his estate, after payment of debts and funeral expenses, to the executors, in trust, to pay one-sixth

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of the net income, quarterly, to each of six descendants for life, and, on the death of any one of them, to transfer his share absolutely to his issue, or in default of issue, to the survivors and their representatives, equally, *per stirpes*. *Held*,

1. That the provision, as regarded the descendants, was equivalent to a gift of a life estate to each, in severalty, and that there was no suspension of the absolute ownership, or power of alienation, of any share, longer than for the life of the particular beneficiary, after which, by the terms of the will, the share vested absolutely.
2. That this result was not affected by the vesting of the estate in trustees, for the purpose of receiving and paying over the income, the suspension being the same as if the gift of the income for life had been directly to the beneficiaries.

Monarque v. Monarque, 80 N. Y. 320,—compared.

APPLICATION for the probate of a will, by Emma D. Van Vleck, a daughter and an executrix, etc., of decedent, who died in November, 1877, aged eighty-four years, and leaving an estate of over \$800,000.

Objections to the probate were filed by Edward P. Dickie, a son of decedent, and others, on the grounds that the instrument propounded was not the last will and testament of decedent; that he was not of sound mind; that he did not acknowledge the same or declare it to be his last will and testament; that the witnesses did not sign at decedent's request; that decedent revoked and annulled the same; that it was procured by undue influence; that it was not executed in manner required by law; and that the trusts and powers were void by the laws of this State. Further facts appear in the opinion.

ROBINSON & SCRIBNER, *for proponent*.

BOARDMAN & BOARDMAN, *for contestant E. P. Dickie*.

THE SURROGATE.—[After a review of all the testimony.]—The first question to be considered is whether the proof of the factum of the will is sufficient to justify its

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probate. Defendant's mental capacity being established, the contestants' counsel claims that there is not sufficient evidence to satisfy the mind of the court that the paper propounded really represents the intention of the testator; and in this connection, the facts as to the preparation and execution of the instrument should be stated. Mr. Peckham testified to the due and formal execution of the instrument according to the facts stated in the attestation clause; that a week or two before its execution, decedent, being an entire stranger to him, called upon him to draw his will, and that he then received instructions from him as to its provisions, and made a memorandum thereof, and then made an appointment with the decedent to meet him at his house; and that, after making a draft of the instrument from the instructions, he called at the house and saw decedent and left it with him for examination, and that he afterwards came to the office and executed it; that decedent gave his instructions with intelligence and coherence; there was nothing in his manner to attract his attention. Counsel for contestants cites the case of *Delafield v. Parish* (25 N. Y., 9), as authority for the doctrine that the burden of proof, that the decedent had testamentary capacity, is upon the proponent, which is undoubtedly true, on the consideration of the whole testimony in the case; in other words, that the court must be satisfied that the decedent had mental capacity at the time of the execution of the instrument; but a careful examination of the case cited does not warrant, as seems to be supposed by the counsel, the doctrine that in the first instance, as a part of the factum of the will, it is incumbent upon the proponent to show affirmatively that the testa-

tor is of sound mind, though that is stated in the opinion of DAVIES, J.; but at page 97, there is the concurrence of a majority of the court to the statement that the legal presumption is that every man is *compos mentis*, and the burden of proof that he is not *compos mentis* rests on the party who alleges that an unnatural condition of mind existed in the testator; that he who sets up *non compos mentis* must prove it; so that the proof was amply sufficient to admit the will to probate when the proponent rested; and any question of doubt as to mental capacity, or proof that the decedent did not intelligently understand the provisions of his will, are matters of affirmative proof by contestants. In *Croft v. Day* (1 *Curteis*, 782), cited by contestants' counsel, the fifth codicil was rejected, on proof that the decedent was, at its execution, of fluctuating capacity, the codicil having been prepared by a solicitor in his own favor, because the court was not satisfied that decedent understood the contents of the instrument, and intended it to operate, there having been no instructions given by the testator for the drawing of the instrument, though it appeared that it was read to decedent before execution. The affirmance of this case (3 *Moore, P. C. C.*, 136), needs no comment.

In *Sankey v. Lilley* (1 *Curteis*, 397), cited by the same counsel, the will was rejected, the subscribing witnesses only being examined, where the decedent was of advanced age and infirm, where the instrument was drawn from the instructions of the executor, none having been given by decedent, she being upward of eighty years of age, very infirm, deaf, almost blind, and bed-ridden for years.

In *Ingram v. Wyatt* (1 *Hagg. Ecc.*, 384), it was held

that mere evidence of execution by a person of weak, inert mind, appointing his attorney, the agent, sole executor and almost universal legatee of a very large property, was insufficient without proof of instructions, where the instructions were given to the solicitor in the handwriting of the executor's father, the codicil being prepared exclusively for his own benefit by the executor, in whose house the decedent was living apart from his family, and other circumstances strongly inferring fraud and circumvention. The case is so utterly dissimilar from the one under consideration that it is difficult to understand why it should have been cited.

In *Mitchell v. Thomas* (6 *Moore, P. C. C.*, 137), the instrument was propounded by the drawer and beneficiary, which was executed when decedent was of doubtful capacity, without evidence of instructions or knowledge of the contents, and it verified the bequests of the will in behalf of the drawer, and was executed when the testator was supposed to be dying, and the only evidence as to the knowledge of the testator in that enfeebled condition was that the codicil was presented to decedent while in bed for him to read; the proof was not sufficient to enable the court to find that he did read it, much less understand it.

The case of *Durnell v. Corfield* (1 *Robertson Ecc.*, 51) does not materially differ from those already cited, and they all seem to be cases where no instructions were given by the decedent for the drawing of the instrument, and they were either what may be denominated undutiful wills, or the persons drawing them, or procuring them to be drawn, were beneficiaries thereunder.

In the case of *Horn v. Pullman* (72 *N. Y.*, 269), the

decedent, eighty-three years of age, of impaired mental and physical powers, made a will, leaving the bulk of his property to his grandson, excluding his children, differing somewhat from former wills; his children visited him seldom, and declined to have him live with them, which he complained of, although their relations were friendly; he gave instructions for the will without suggestions from others, and stated the reasons for the changes he desired to make; the will was read to him after being drawn; he pronounced it right and executed it, and it was admitted.

In *Rollwagen v. Rollwagen* (63 *N. Y.*, 504, 517), *EARL, J.*, says: "When the testator executes a will in the mode required by law, the fact of such subscription and execution are sufficient proof that the instrument speaks his language and expresses his will, but when the testator is deaf, dumb, and not able to read or write or speak, something more is demanded; there must be then not only proof of the factum of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language, and really expresses his will."

In *Weir v. Fitzgerald* (2 *Bradf.*, 42), the Surrogate says: "Something more is necessary to establish the validity of the will in cases where, from the infirmity of the testator, his impaired capacity or the circumstances attending the transaction, the usual inference cannot be drawn from the mere formal execution. Additional evidence is, therefore, required that the testator's mind accompanied the will, that he knew what he was executing, and was cognizant of the provisions of the will."

In this case, there is nothing in the terms of the will

to make it undutiful, for though the contestant Edward P. Dickie is not a beneficiary, yet his only child, a grandson of the decedent, is given precisely the same as decedent's children, except Edward, who therefore stands in his father's shoes in that particular; and the fact is admitted that Edward was possessed of an ample fortune. Besides, the circumstances under which the will was drawn and executed raise no presumption of fraud or imposition, and the most that can be said is that decedent was of impaired mental capacity, and that for that reason the court should require something more than the formal execution of the instrument to indicate that the will was the deliberate, intelligent act of the decedent, and that he appreciated its terms.

It seems to me that this additional proof is abundantly furnished by the fact that the will, as to its provisions, was dictated by decedent to a strange attorney, who knew nothing of his property, his family, or otherwise of his testamentary purpose; affording, to my mind, much stronger proof of his intelligent volition, than would have been evinced by the production to the attorney of written instructions, though in his handwriting, for those may have been the result of suggestions or dictation of interested parties; indeed, the case, to my mind, is wholly divested of any suspicious interference with his disposition, and leaves no doubt in my mind that the will was his deliberate and intelligent act, unless the testimony shall warrant the conclusion that he was of unsound mind at the time of execution. I am thus brought to the consideration of that question, in which I am of the opinion that the circumstances of the

dictation and execution of the instrument will form a very significant feature.

In considering the question of decedent's mental capacity or condition at the time when the instrument propounded was executed, as indicated by the testimony in the case, it will be necessary to observe that the fact that decedent, in 1874, was adjudged a lunatic, is calculated to influence, to some extent, the testimony of the witnesses in respect to his mental condition in 1871, prior and subsequent thereto.

It is very difficult to reconcile the testimony of the respective witnesses, as to conversations and conduct of the decedent before, during, and after 1871; for, while contestants' witnesses gave various strange sayings and doings of the decedent, and claimed that he was incorrect and irregular in his conversation, and his manner suggestive of unsoundness of mind, yet those witnesses testify to a period covered by the testimony of the proponent's witnesses, including the two agents, Mr. KISSAM and Mr. WOODRUFF, embracing his tradespeople, various mechanics and workmen, all of whom gave detailed statements of their intercourse and dealings with him, and stated they observed nothing in his manner different from that which they had observed years before, and nothing to excite their attention as unusual and extraordinary; and it is inconceivable that both classes of witnesses can testify truly, for if he manifested such signs of mental derangement, from time to time for a series of years, as are testified to by contestants' witnesses, it is impossible to conceive that those dealing with him during the same time, who testified in behalf of the proponent, can have failed to observe such mani-

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festations, and it is hardly credible to suppose that the various acts of intelligent business dealings by the decedent could have been performed without the evidences of unsoundness testified to by the contestants' witnesses; and hence, in this conflict, it becomes important to determine where the truth lies from such testimony as is least liable to mistake or misconception, the most important of which seems to me to be afforded by decedent's instructions, and the intelligent provisions of his will, evincing an understanding of its terms, and knowledge of the claims upon his bounty by members of his family; and the fact that he had personal and real estate, and made provision for the income thereof to be paid in due proportion to those members; and the recognition subsequently of the fact that he had made a will and had not given the contestant Edward anything therein, and stated whom he had named as executors; and that in 1872 and 1873 he evinced a clear understanding of the character of his property and its value, in his statements to his two agents whom he had employed to care for the management of his estate, and intelligent accounts which he kept of various transactions with persons with whom he dealt, and his servants, his collection of rents and the proper accounts thereof, entering the amounts due, and giving receipts therefor, employing numerous workmen to make repairs upon his house and other property, and paying them according to the terms of the contract, and consulting with Mr. Woodruff as to the respective leases which he executed of his real estate—all combine to indicate to my mind that the alleged manifestations of incoherence, suspicions and delusions must have been greatly exaggerated by the witnesses who testified to the facts

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forming the basis of the hypothetical questions upon which the distinguished experts in this case gave their opinions of decedent's condition. And it is my duty, as well as a pleasure, to state that those opinions are of much more than usual satisfaction to a legal mind; for they stated that, if the intelligent and coherent conduct of important business matters by decedent as testified to by numerous witnesses was true, they would be led to doubt the truth of the facts set forth in the hypothetical questions, and that in such a case they would deem it necessary, in forming a safe conclusion, to know more of the general character, early history, habits and peculiarities of the decedent—according with the opinion which I have long entertained, that isolated incidents in the life of intelligent, educated and cultured people might be so grouped together as to make the most sane of men appear to have been mentally unsound, and that, in order to a wise and safe judgment, isolated incidents usually presented to experts need to be supplemented by a statement of the general character, conduct and habits of the person, for all of those are needed to determine the character of the man.

Another fact which seems to to me have a most important bearing upon the value of the experts' opinions in this matter is that they concur in regarding the statements of the decedent, in 1870, to the servant Kenney, that his house-keeper was an English spy, and her numerous boxes filled with gunpowder, and that he ordered a barrel of flour sent from the basement because it contained a dead body, as among the most controlling evidences of mental unsoundness; and yet the servant Kenney testified that those things occurred when the decedent was very ill,

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and that, in a short time after, he entirely recovered ; and the testimony given by Dr. Gray and by the contestant Edward P. Dickie, as to what the doctor said of decedent's condition mentally, when he visited him, was shown by the latter to have been at a time when he was very ill, and that in the course of ten days he recovered.

I am, therefore, of the opinion that the facts stated in the hypothetical questions, upon which the experts based their opinion that decedent was not of sound mind in March, 1871, when the instrument propounded was executed, have been substantially disproved, and therewith those opinions must fall as a basis of determining the issue in this case. It is also proper to observe that many of the facts and incidents stated in the hypothetical questions, upon which the experts gave their testimony, occurred at a considerable period subsequent to the execution of the instrument propounded, ranging from that time to 1874, a fact which militates considerably against the safety of the opinions expressed by the experts respecting his mental condition at a time when the instrument was executed, for they all agreed that the condition ascribed to him was of a progressive character.

A piece of testimony which militates most strongly against the mental condition of the decedent, at the time of the execution of the will, appears to me to be his extraordinary letter written to his son Horace, in Europe, in 1871, a few weeks after the execution of the will, for while most of the letter seems to be intelligent and coherent, and in strict consonance with the character of his will, yet there is that which relates to Mrs. Turell, her obstacle to the family compact, and the mode suggested by which it was to be overcome, which is entirely

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unreasonable and unintelligible by any testimony furnished in this case, yet I do not feel warranted, upon that piece of evidence alone, to override all other evidence in the case, showing his mental soundness when he executed the will and for years thereafter ; and I am of the opinion, upon the whole testimony, that the decedent when he executed his will was possessed of sufficient capacity to comprehend the condition of his property, his relations towards the persons who were or might be the objects of his bounty, and the scope and bearing of the provisions of his will ; which is the adjudged capacity requisite for the due execution of such an instrument (*Delafield v. Parish*, 25 *N. Y.*, 9 ; *Van Guysling v. Van Kuren*, 35 *Id.*, 70 ; *Tyler v. Gardiner*, 35 *Id.*, 559 ; *Kinne v. Johnson*, 60 *Barb.*, 69 ; *Meeker v. Meeker*, 75 *Ill.*, 260 ; *Bundy v. McKnight*, 48 *Ind.*, 502 ; *Horn v. Pullman*, 72 *N. Y.*, 269).

There is no testimony in this case, tending to show the exercise of any restraint or undue influence upon the decedent, respecting the execution or provisions of his will.

This brings me to the consideration of the question raised as to the validity of the trusts contained in the will ; and, for convenience, it will be well to state here the provisions which are called in question. By the second clause the residue of decedent's estate is given to the executors, in trust, to pay one equal sixth part of the net income, quarterly, to five of his children respectively, and to his grandchild, Perry Dickie, for life ; and when one of the *cestuis que trust* shall die, the trustees are directed to transfer and convey to his or her issue one-sixth of the personalty, and the one undivided sixth

of the realty; in case he or she shall not leave issue, then said sixth of the personalty and realty to be given and conveyed to the surviving beneficiaries named, equally, and to the heirs and personal representatives of such as may have deceased, equally, *per stirpes* and not *per capita*.

The trustees are also empowered, when deemed expedient, to use the personalty for the erection of buildings upon or otherwise improving the real estate.

It is further provided that when it shall seem desirable, after the death of any of the *cestuis que trust* first named, to partition and divide the property, the said trustees are empowered so to do, into six parts or less, as they shall deem best, and convey to such persons as shall be entitled under the will, the several, instead of the undivided portion of the real estate, and in case the partition shall be impracticable, they are empowered to sell, convey, and hold the proceeds, and divide the same according to the provisions of the will.

It is claimed by the contestants' counsel that the alienation of the real estate, and the ownership of the personalty, are suspended for more than two lives in being, in violation of the statute (2 *R. S.*, 1101 [6 ed.], §§ 14, 15; *Id.*, 1167, § 1).

In *Monarque v. Monarque* (80 *N. Y.*, 320; *S. C.*, 8 *Abb. N. C.*, 102), it was held that the gift of an income to decedent's four daughters, for life, was equivalent to a devise to them of a life estate in the land, in severalty, of one-fourth of the property, and from that well-considered case, based upon the authorities cited, it follows that the gift of the income of the estate for life to the respective sons, daughters and grandchild of the deceased would,

in this case, if no trustees intervened, have been a devise of a sixth part of decedent's estate for life to the respective sons, daughters and grandchild in severalty, and that, therefore, in such case, there would have been no unlawful suspension of alienation of the real estate, or ownership of the personalty; for each sixth share would have been suspended for the life of the wife and the life of the respective beneficiaries, when the estate in severalty became vested; and the case under consideration is stronger than that of *Monarque v. Monarque*, above cited, for the reason that, in the same clause of the will under consideration, whenever any of the beneficiaries named should die, then the trustees should deliver and convey to the lawful issue, if any, one-sixth part of said estate; in case of no issue, then to the surviving beneficiaries absolutely; clearly, as it seems to me, indicating a design that the property should vest in severalty, under the will, in the respective issue or survivors; and the suggestion of counsel for the contestants, that after the death of the widow* and one of the legatees, the two lives provided for by the statute have been exhausted, and that the shares of the survivors and the power of alienation are suspended for more than two lives—to wit, until the death of those whose death shall precede the particular beneficiary is answered, for the reason that, the devise being in severalty, there is no suspension of the ownership or power of alienation going to any particular beneficiary for a longer period than the life of the widow

* As decedent left no widow, there was no life estate preceding those of the five children and one grandchild. It is understood that the two lives referred to in the argument of contestants' counsel were those of the two descendants of the decedent, beneficiaries, first dying.—REP.

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and his own life, when, by the terms of the will and the construction referred to, there is an absolute vesting of the property, with full power of alienation.

In *Manice v. Manice* (43 *N. Y.*, 303, 368, 369), Judge RAPALLO states the general rule to be that, where by a will shares or interests in real or personal estate to be ascertained by a division are given, or where real estate is directed to be sold and the proceeds divided, the estate or interest of the devisee or legatee, in the property to be divided or converted, is a vested interest before the conversion or division; but if the intention is unequivocally expressed otherwise, effect must be given to it, but that such an intention will not be imputed to the testator, if it can be avoided.

The only remaining question, as it seems to me, needing consideration is whether, by the intervention of trustees and a devise to them of the income for the benefit of the so-called second life tenants, there is any different suspension of alienation. Upon the best consideration that I have been able to give the subject, I can see no reason why the vesting of the estate in a trustee, for the purpose of receiving and paying over the income for the benefit of the legatees, should be any different suspension than there would have been if the devise of the income for life had been directly to the beneficiaries, instead of to a trustee; indeed, the case of *Monarque v. Monarque*, cited, was a case where a trustee intervened.

I am, therefore, of the opinion that the provisions of the will questioned by the contestants are valid, and that the proof in this case establishes the due execution of the instrument, according to the requirements of the

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statute, by the decedent, when he was of sound, and disposing mind and free from restraint.

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
May, 1881.

MATTER OF DEMMERT.

In the matter of the application for letters of administration on the estate of JOHN DEMMERT, deceased.

Upon an application for letters of administration, an opposing party, interested under a will claimed to have been destroyed, must not only prove that the will was not legally revoked, but be able to prove the will itself; and this in the same proceeding. The court cannot look into prior proceedings for probate, to find evidence on the subject.

Accordingly, where the applicant for letters of administration swore that decedent died without leaving a will, and those claiming that a will had been made and destroyed adduced no evidence,—*Held*, that the proof, on the part of the applicant, was sufficient under Code Civ. Pro., § 2061, and that his petition should be granted.

APPLICATION for letters of administration, in intestacy. The facts appear sufficiently in the opinion.

FISHER, HURD, & VOLTZ, *for petitioner.*

CHARLES L. LYON, *for Mrs. Schnell.*

THE SURROGATE.—The petitioner swears that the deceased died without leaving a last will and testament. As a matter of fact, the deceased left a will, which was set aside by this court (*Demmert v. Schnell*, 4 *Redf.*, 409).

It being understood that the deceased had made

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another will, which had been destroyed, the principal beneficiaries under that will were cited or appeared on this proceeding, but did not claim that the deceased had left a will. It may well be that the deceased's will was destroyed under such circumstances that it was not thereby revoked; but that fact must be proved, before the court can take any notice of it; and it must be proved by evidence given in this very proceeding. The court has no right to look, of its own motion, into the evidence given in the proceedings, to admit the deceased's will to probate, to find proof on the subject, even if such evidence were admissible, which it is not (*Powell v. Waters*, 17 *Johns.*, 176, 177; *Wilbur v. Selden*, 6 *Cow.*, 162; *Weeks v. Lowerre*, 8 *Barb.*, 530).

Not only must the persons interested under the will which was destroyed prove that it was not legally revoked, but they must be able to prove the will itself, before the court can refuse to grant letters of administration on the estate of the deceased; for if the will was legally revoked, or cannot be proved, the deceased must be held to have died intestate.

The petitioner has made the proof required by statute, that the deceased died without leaving a will (*Code*, § 2661), and, in the absence of evidence to the contrary, and of any claim made by any one that the deceased left a will, this application must be granted (*Isham v. Gibbons*, 1 *Bradf.*, 69, 70).

Let a decree be entered accordingly.

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KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
August, 1881; again, March, 1882.

LACEY v. DAVIS.

*In the matter of the final accounting of JOHN C. DAVIS,
executor, and MARGIE B. LACEY, executrix, of FRED-
ERICK LACEY, deceased.*

Where an executrix and two executors qualified, and the executors took upon themselves the exclusive management of the estate, not even consulting with the executrix, who never had possession of the assets, but allowed the executors to have entire control, reposing confidence in their integrity and capacity,—*Held*,

1. That these circumstances relieved the executrix from liability for losses occasioned to the estate, by acts of the executors, committed without her acquiescence or consent, express or implied; but
2. That she was liable for the result of any improper action of her co-executors, to which she consented, or which she could have prevented.

Accordingly, where the co-executors (1) lent \$5,000, funds of the estate, without security, and (2) invested \$4,400 of the funds in the capital stock of a corporation; and it appeared that the executrix knew nothing of the loan, until long after it was made, and took steps to collect the amount lent, without success,—and that she was not consulted as to the stock investment, but was informed that the shares received were a stock dividend, upon stock already held by the estate, and did not discover that they had been bought until after the accounting began.—*Held*, that no liability attached to her, in the premises, although she had joined with her co-executor in rendering an account, under oath, of all their proceedings, which account included the unauthorized investments, coupled with the statement that the investments of the funds of the estate were made by the executors.

But where the executors subscribed for bonds to the amount of \$10,000, to protect certain stock formerly owned by the testator, being assets of the estate, which they ought previously to have disposed of; and it appeared that the executrix knew, all along, that the estate held the stock, and made no effort to sell it, nor even asked the executors so to do; on the representatives' accounting, *Held*,

1. That the executrix, having acquiesced in keeping the stock on hand, was liable, with her co-executor, for the consequences of so doing.
2. That the accounting parties were to be charged with the amount sub-

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scribed for the bonds, and, it appearing that the stock had risen, they were to be credited with any increase in the price of the stock, over and above its value at the time when it should have been sold, *i. e.*, at the end of one year after the testator's death.

The authorities upon the subject of the liability of an executor or trustee, for the *devastavit* of his co-executor or co-trustee,—collated.

Bates v. Underhill, 8 *Redf.*, 365,—declared overruled.

THIS was a rehearing of a motion to confirm an auditor's report on final accounting of executors, after the taking of additional testimony at the instance of the executrix. The facts appear sufficiently in the opinion.

E. B. CONVERS, for *Cornelia A. Lacey*, objector.

MAN & PARSONS, for executors.

F. STORRS, for *Ella L. Storrs and others*.

C. T. MIDDLEBROOK, guardian *ad litem* for infants.

THE SURROGATE.—When this matter was before me on a former occasion, I held that, inasmuch as the executrix had joined with the executor Davis, in rendering an account under oath, which purported to be an account of all their proceedings as executor and executrix of Frederick Lacey, deceased, and contained a list of investments, with a statement that the said investments of the funds of the estate were made by the executors, it was incumbent upon her, if she claimed to be exempt from liability on any of the said investments, to prove the facts on which she founded such claim, and I granted her the opportunity to make such proof (*Lacey v. Davis*, 4 *Redf.*, 402, 403, 408). She has availed herself of the opportunity thus given, and further testimony has been taken, which is now to be considered.

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One of the objectionable investments was the loan of \$5,000 to the St. John's Protestant Episcopal Church, in the city of Brooklyn, without security. The executrix testifies that she never knew anything of it until 1878, long after it had been made, and that she then took steps to collect the amount, but without success. She is not to be held liable for this investment.

Another of the objectionable investments was the purchase of forty-four shares of the stock of the Old Dominion Steamship Company. The executrix says that she was not consulted on the subject; that she was informed that these shares had been given to the estate as a stock dividend on the stock it already held, and that she did not discover that they had been purchased until this accounting had been begun. No liability attaches to her.

The objection to the investment of the funds of the estate in the bonds of the Worcester Railroad Company, does not rest upon the nature or insecurity of the investment, for it was made for the purpose of protecting the stock of the Old Dominion Steamship Company, held by the estate, and would have been justified, as coming within the discretion possessed by the executors on the subject, had it been proper for them to still have the stock on hand (*Collinson v. Lister*, 20 *Beav.*, 356; *Matter of Estate of Brittin*, N. Y. Surr. Ct., Sept., 1878). It is immaterial, therefore, whether the executrix consented or objected to the investment, although upon the evidence it is clear that she did consent to it. It is true, she immediately changed her mind, and sought to withdraw her consent; but it does not appear that the letter, which she wrote to that effect and sent to Mr. Ockershausen,

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ever reached him, and later, when she was informed that the bonds had been subscribed for by her co-executors, she seems to have acquiesced in the investment, for she says she was assured by Mr. Ockershausen that other estates had taken these bonds; that the vice-president had taken them, for an estate of which he was the guardian of his brother's or sister's children, and that, resting on that, she supposed it was all right.

The executors were held liable for the investment, because they did not show any good reason for having kept the stock of the steamship company on hand until it became necessary to protect it by subscribing for these bonds (*Lacey v. Davis*, 4 *Redf.*, 402, 406).

The question then is, whether the facts proved exempt the executrix from such liability.

Taking the whole evidence together offered on this accounting, it appears that up to the time of the death of Mr. Ockershausen, he and the executor, Davis, took upon themselves the exclusive management of the estate, not even consulting with Mrs. Lacey, the executrix, about it. That the executrix did not interfere; never had possession of the assets of the estate, and was content to let the two executors manage the estate in their own way, reposing full confidence in their integrity and capacity for business. These circumstances relieve her from liability for any loss occasioned to the estate by the acts of her co-executors, committed *without her consent or acquiescence*, express or implied.

I do not understand the authorities in this State to go beyond that, and she will still remain liable for the result of any improper action of her co-executors, to which she gave her consent, or which *she could have prevented*.

Thus, in *Monell v. Monell* (5 *Johns. Ch.*, 283), it was held that when, by any act or agreement of one trustee or executor, money gets into the hands of his co-trustee or co-executor, both are answerable.

In *Sutherland v. Brush* (7 *Johns. Ch.*, 17), it was held that the executor P. was not responsible for the *devastavit* of his co-executor C., any further than he was shown to have been knowing and assenting, at the time, to such *devastavit*, or misapplication of the assets of the estate; but that he was liable, if he was knowing and assenting to it; that merely permitting one executor to possess the assets, without going further and concurring in the application of them, does not render the other answerable for such assets. And it was there said by the court that, if it appeared that any debts had been lost by the willful negligence, or the want of reasonable and ordinary care and diligence in either, or both, of the executors, the loss ought to be charged to one or both of them, to whom the default was justly to be imputed.

In *Banks v. Wilkes* (3 *Sandf. Ch.*, 99), the defendants had permitted the trust fund to pass into the custody of their co-trustee. It was invested in bonds and mortgages, and he collected \$6,000 of the principal sum of one of the mortgages and used it for his own purposes, or invested it in some speculation whereby it was wholly lost. The defendants were held not to be liable, the vice-chancellor saying, that the circumstance of the individual custody of the trust fund by one of the trustees was not to be deemed a breach of trust in the others, citing *Sutherland v. Brush* (7 *Johns. Ch.*, 17, 22), and that the loss in question occurred *before* there was any known

reason or cause for the defendants to interfere with their co-trustee's possession of the bonds and mortgages.

In Kirby v. Turner (*Hopk. Ch.*, 309, 330), it does not appear that the defendants had knowledge of any facts which would suggest to them the propriety of interfering to prevent loss to the estate.

The same may be said of Kip v. Deniston (4 *Johns.*, 23), and of Ormiston v. Olcott (84 *N. Y.*, 339), in which it is held that there is no difference between executors and trustees, as to the rule that each is liable only for his own acts, and that one cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein; and the court adds, that there would be neither wisdom nor justice in a rule which would practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit *and could not prevent*. It is clear that this decision was not intended to apply to a case where a trustee had knowledge of acts on the part of his co-trustees which endangered the safety of the estate, and the continuance of which could be prevented.

In Bates v. Underhill (3 *Redf.*, 365), overruled in Ormiston v. Olcott, *supra*, the defendant had no knowledge that his co-trustee Barker was wasting the funds of the estate; on the contrary, Barker was an attorney in good standing and credit, and on several occasions he had assured the defendant that the funds in his hands were invested, and that he was making payments out of them.

In Paulding v. Marvin (3 *Redf.*, 365, note), the trustee, who had never had possession of the money, did not know that it had been retained by the defaulting trustee,

but believed that it had been invested in a particular bond and mortgage, as agreed upon by the trustees.

In *Clark v. Clark* (8 *Paige*, 152), the head-note lays down the rule that, where an executor by his negligence suffers his co-executor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the heirs and next of kin for the estate thus wasted.

In *Johnson v. Corbett* (11 *Paige*, 265), it was held that an administrator, who suffers or permits his co-administrator to misapply the funds of the estate, where he has the power to prevent it, is liable in equity for such misapplication, if the amount misapplied cannot be collected from his co-administrator.

In *Wood v. Brown* (34 *N. Y.*, 343), the court of appeals say that one executor is not generally responsible for the wrongful act of the other, unless he joins in it, or neglects to prevent it, when he could do so by proper care.

In *Weetjen v. Vibbard* (5 *Hun*, 265), it is held to be the positive duty of each trustee to protect the trust estate from any misfeasance on the part of his co-trustees, and to institute such proceedings as shall prevent it.

In *Adair v. Brimmer* (74 *N. Y.*, 539-566), the court of appeals hold that it is not necessary, for the purpose of establishing the liability of an executor for advances improperly made to a legatee, to show his express consent to them; that when an executor, by his negligence, suffers his co-executor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the beneficiaries under the will, for the estate

thus wasted, citing *Clark v. Clark*, *supra*. See also *Whitney v. Phoenix* (4 *Redf.*, 198).

Croft v. Williams (23 *Hun*, 102) recognized the correctness of the doctrine that an executor, who negligently manages or carelessly permits his co-executor to waste the estate, must, on that ground, be held liable for all the assets which he might have cared for and preserved.

In *Earle v. Earle*, a case recently decided by the superior court of the city of New York, not yet reported, after alluding to the rule that each of several trustees is not bound to take upon himself the conduct of every part of the trust, and, where, according to the reasonable necessities of business, trust funds came into the hands of one trustee and a loss happened from the default of such trustee, holding that the others were not liable, though for the sake of conformity they joined in the execution of a receipt or conveyance or other disposition of the trust estate, the court say: "But this exemption from liability exists only when it is made to appear that the default of one occurred in spite of the exercise of the requisite care and diligence by those who seek immunity. The moment want of care and diligence is shown, which contributed to the loss, the case is taken out of the general rule, and the liability attaches."

In the case of *People v. Townsend* (37 *Barb.*, 520), the court say: "One administrator is not ordinarily responsible for moneys received and expended by, or for the wrongful act of his associate; but in a case where both have the same power to act, and fail to do so, can one of them alone be made personally liable, and the other entirely exonerated? In this case, the administrator had the principal charge and management of the

business of the estate, yet at the same time there was nothing to prevent the administratrix from taking measures to prosecute the defendant for the alleged demand. She had full knowledge of its existence, and had undoubted authority to prosecute a suit in the name of both for its recovery. Although she relied upon her associate to attend to the business of the estate, she could hardly thus relieve herself from the performance of a plain duty. It is, at least, very questionable whether this excuse is a legal bar to a claim against her for a neglect so clear and palpable. Were this an original question, I should be inclined to hold that it was not sufficient to exonerate her from liability" (citing *Slaughter v. Froman*, 5 *Monr.*, 19; *Edwards v. White*, 12 *Conn.*, 28; *Hoell v. Blanchard*, 4 *Dessau.*, 21; *Collins v. Carlile*, 7 *B. Monr.*, 13; *Green v. Hapberry*, 2 *Brock.*, 403; *Morrow v. Peyton*, 8 *Leigh*, 54).

In the principal case, the executrix knew all along that the estate held the stock of the Old Dominion Steamship Company, and she says that she was often congratulated on having such good paying stock. She could have sold or compelled a sale of it (*Wood v. Brown*, 34 *N. Y.*, 337; *Burt v. Burt*, 41 *Id.*, 46, 51, 52). But it does not appear that she ever made the least effort to get rid of it, or that she even ever asked her co-executors to sell it. She must be held to have acquiesced in keeping the stock on hand, and is liable, with her co-executors, for the consequences of so doing, upon the principle that when an executor or a trustee stands by and permits his co-executor or trustee to commit a breach of trust when he could prevent it, he becomes lia-

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ble therefor (*Williams on Executors*, 1827; *Matter of Macdonald*, 4 *Redf.*, 321-324).

The evidence shows that the remaining objectionable investments and payments were made without the knowledge and acquiescence of the executrix; she is not chargeable with any neglect of duty in not having prevented them, and, therefore, no liability attaches to her.

Subsequently, the executrix made a further application before decree, the nature of which sufficiently appears in the following opinion, delivered March 15, 1882:

THE SURROGATE.—The executrix, by the decision heretofore made herein, has been held liable with her co-executors, for the sum of \$10,724.99, and interest, invested by the executors in sixteen bonds of the Worcester Railroad Company, subscribed for to protect the stock of the Old Dominion Steamship Company, which formed part of the assets of the estate. She now asks leave, *first*, to examine her co-executor, Davis, to prove that these bonds were subscribed for without her knowledge or consent; *second*, to prove that, since said decision, she has sold the stock of the Old Dominion Steamship Company at \$106 a share, whereas it is inventoried at \$75 a share; and she claims that in the settlement of the decree she should only be held liable, if at all, for the amount subscribed for the bonds, less the profit made on the stock, over and above the inventory price.]

No ground is shown for leave to examine the co-executor, Davis. Opportunity was given to the executrix, to show the fact, which she now seeks to prove by Davis, and she could have examined him then as well

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as now; besides, the testimony would be immaterial; the executors were not held liable for subscribing for the bonds, but for not selling the stock within a reasonable time after the testator's death (*Lacey v. Davis*, 4 *Redf.*, 406). But if the executors are to be charged with the amount subscribed for the bonds, they should be credited with the increase in the price of the stock over and above its value when it should have been sold, and which time is generally fixed at within a year after the death of the owner.

The executrix does not seek to offset the profit on one investment against the loss on another. The bonds were subscribed for to protect the stock, and the case may be compared to that of a loss made on the sale of stock, which was not, but should have been, sold within a reasonable time after the testator's death.

The loss in this case is represented by the difference between the value of the stock when it should have been sold, and the price for which it actually was sold, less the amount paid for the railroad bonds; and it is for that amount only that the executors are to be held liable.

The executrix, at the time of settling the decree, may show the price at which the stock has been sold since the former decision herein, and, unless the parties can agree upon the value of the stock at the end of one year after the death of the testator, evidence may also be offered at the same time on that point.

Let a decree be presented for settlement.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
September, 1881.

STEINELE v. OECHSLER.

In the matter of the estate of JOSEPH OECHSLER, deceased.

Where a legatee applies to the Surrogate's court for payment of the legacy, an answer by the representative "that the petitioner's legacy is not yet payable by the terms of the will," does not raise such an issue as requires the petition to be dismissed under Code Civ. Pro., § 2718. It raises no issue of fact, but only a question of the construction of the will.

The Surrogate's court, although without general jurisdiction of the construction of wills, has the right to construe a will so far as necessary for the distribution of the estate.

The testator, by his will, gave to his wife one-half of his property, real and personal, absolutely, and the other half to her for life, with power to sell. He then gave a legacy of \$2,000 to an infant, to be paid to him at his majority; and, in case of his death during infancy, the same was given to the testator's brothers and his sister, the petitioner. The infant legatee died before the testator. Upon an application by the sister, during the widow's life-time, to compel payment of the legacy, *Held*, that, upon testator's death, the legacy vested in his brothers and sister; but that the intent of testator was that the legacy should not be paid until after the death of his widow; that the petition was, therefore, premature, and should be dismissed.

It is a cardinal rule of construction that effect must be given, if possible, to every part of a will.

Heard v. Case, 23 *How. Pr.*, 546,—followed.

Bevan v. Cooper, 72 *N. Y.*, 817,—explained.

APPLICATION by Elizabeth Steinele, for the payment of a legacy; opposed by Margaret Oechsler, the executrix.

The facts appear sufficiently in the opinion.

DORLAND & HESS, for legatee.

DANIEL B. AMES, for executrix.

THE SURROGATE.—The executrix does not deny any of the facts on which the petitioner's claim rests, but she simply says that the petitioner's legacy is not yet payable by the terms of the will. This does not raise such an issue as requires the petition to be dismissed under section 2718 of the Code. No issue of fact is raised; it is not even denied that the petitioner has a valid claim against the estate; it is only the time of its payment which is disputed; it is purely a question as to the construction of the testator's will, which it is clearly within this court's jurisdiction to decide, because it becomes necessary to do so in the exercise of the powers expressly conferred by statute.

Thus, on the settlement of an executor's account, the Surrogate's court is to distribute the balance remaining in the executor's hands, and this necessarily carries with it the right to construe the will, so far as it bears upon the distribution of the estate (*Cushman v. Horton*, 59 *N. Y.*, 149; *Teed v. Morton*, 60 *Id.*, 502; *Gill v. Brouwer*, 37 *Id.*, 549; *McNulty v. Hurd*, 72 *Id.*, 518, 521).

So, in the principal case, power is expressly given to this court to enforce the payment of legacies, and that necessarily confers upon it jurisdiction to look into the will to ascertain when the legacy is payable, and to decide accordingly (*Hoyt v. Hilton*, 2 *Edw. Ch.*, 202). The case of *Bevan v. Cooper* (72 *N. Y.*, 317), does not militate against these views. In that case, it was not at all necessary for the Surrogate to decide whether the legacies were a charge upon the testator's real estate, in order to settle the account of the executor, and the court, in holding that the Surrogate had no jurisdiction to pass upon that question, only decided that this court has no

jurisdiction to construe any provision in a will which it is not necessary to interpret, in order to enable the court to carry out the powers expressly conferred upon it; in other words, that the Surrogate's court has no general jurisdiction to construe wills.

This brings us to a consideration of the question, whether the legacy given to the petitioner is payable before the death of the testator's widow, who is also his sole executrix.

The testator first gives his wife certain personal property, such as prints, books, plate, etc. He then gives to her, absolutely, one-half of the remainder of his property, real and personal, and further gives her the other half to use and enjoy during life, with power to sell.

He gives to Joseph Herman Werjes a legacy of \$2,000, to be paid to him when he shall have arrived at the age of twenty-one years, and, in case he should not have arrived at that age at the decease of the testator's wife, the amount of the legacy is to be placed in some responsible savings institution, to be paid to him as aforesaid, and, in case of his death before twenty-one, the legacy is given to the testator's two brothers, and to his sister, who makes this application, to be divided among them, share and share alike. All the rest, residue and remainder of the estate, real and personal, is given and devised to the testator's said two brothers and sister, in equal shares. The testator appoints his wife sole executrix, and, after her death, his two brothers and his sister above mentioned, executors of his will.

Joseph Herman Werjes died before the testator, aged nine years. The legacy, therefore, upon the death of the testator, became vested in the testator's two brothers

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and his sister (*Downing v. Marshall*, 23 *N. Y.*, 366) ; and if there was nothing in the will showing a contrary intention, it would be payable after the expiration of one year from the granting of the letters testamentary (2 *R. S.*, 91, § 45). But in giving to his widow one-half of the residue of his estate, absolutely, and the other half to be used and enjoyed by her during her life, the testator clearly manifested his intention that the legacy given to his brothers and sister should not be paid until after the death of his wife. It is the only construction that will not violate that cardinal rule, that effect must be given, if possible, to every part of the will. To hold that the legacy is payable before the death of the widow would be in disregard of those provisions which secure to her the whole estate during her life. In *Burdett v. Young* (5 *Bro. P. C.*, 54), after a general gift of all the estate to the wife for life, there was a legacy to a grandson and granddaughter when they attain the age of twenty-one ; the House of Lords, reversing the Lord Chancellor, held that the legacy was not payable until the expiration of the life estate.

In *Heard v. Case* (23 *How. Pr.*, 546, 551), the testator gave to his widow the use, occupation, and income of all his estate during her natural life, and also gave to the widow of a deceased son \$250, for which no time of payment was set, and it was held that the legacy was not payable until the determination of the life estate of the testator's widow.

The petitioner's application is premature ; her legacy is not yet payable, and her petition must be dismissed.

Ordered accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
September, 1881.

SPAULDING v. GIBBONS.

*In the matter of the probate of the will of PATRICK
FLAHERTY, deceased.*

It is not necessary that a subscribing witness to a will should actually see the testator sign; it is enough (in the absence of an acknowledgment), if his signature was affixed in the presence of the witness; and a constructive presence, as being in an adjoining room, the door to which was open, may be deemed a compliance with the statute.

Upon an application for the probate of a will, to which there was no attestation clause, the testimony of the subscribing and other witnesses showed that the necessary formalities were complied with, except that there was a question whether the testator signed in the presence of one of the subscribing witnesses. There was no claim that the testator acknowledged his subscription. It appeared that the execution took place while testator was in bed, in a small room; that the will was read to him, and he said it was what he wanted, and declared that he had his full senses and understanding; that he asked one witness to sign, while the other witness was requested so to do by a third person in testator's presence. The former witness testified that testator signed in the presence of both witnesses, before they affixed their signatures, and declared the paper to be his last will. The latter witness did not remember whether he saw testator sign or not, but the evidence showed that he was, at the time, either in the same room or in an adjoining room, in such a position that he could see the signing after his attention was drawn to what was going on. The whole transaction occupied about five minutes.

Held, that, upon the evidence, the testator must be considered to have signed in the presence of each subscribing witness, and that the proper execution of the will was proved.

APPLICATION, by Rose Gibbons, executrix, for the probate of a will; opposed by Mary Spaulding, a sister of decedent, and others.

The facts appear sufficiently in the opinion.

SPAULDING v. GIBBONS.

JOHN COONEY, *for proponent.*

MCGUIRE & KUHN, *for contestants.*

FREDERICK A. FOX, *special guardian for infants.*

THE SURROGATE.—No testimony was given on the part of the contestants, and the only question that arises on the evidence is as to the proper execution of the will.

The testator was of sound and disposing mind, and the will was drawn to conform to his wishes. There is no attestation clause. Michael Devine, one of the attesting witnesses, says that he did not see the testator sign the will; that it was read to the testator in his presence; that, at the time, the testator said that he had his full senses and understanding, and then the witness was asked to sign it by Mr. Martin, in the presence of the testator, and he did so; that Mr. Ryan, the other witness, was there, but that he did not sign in his, Devine's, presence. He subsequently states that he could not say that Ryan did not sign in his presence; that he did not remember; and when asked if he remembered that the testator did not sign in his presence, he answered: "No, sir, I could not say that he did not."

John Ryan, the other witness, says that he was present when the will was drawn; that Devine was not then present, but was sent for, because Martin, a cousin of the deceased, did not wish to be a witness; that after Devine came, the will was read to the testator, in the presence of Devine; that the testator signed in the presence of Devine; that the testator requested him, Ryan, to be a witness to the will; that he signed as a witness and handed the pen to Devine, who also signed as a witness; that the testator said that the paper was his

last will, and called upon the bystanders to witness that he was perfectly sane and understood what he was doing ; that all this was done while Devine was present ; that Devine could not stand in the bedroom, where the testator was lying in bed, because it was too small ; but that he stood in the door-way, in the entrance to the door, where he could see and hear all that was done ; that he came into the small room to sign the will.

James Martin says that, after the will was drawn, he read it to the testator in the presence of the two witnesses ; that the testator said it was what he wanted ; that he wanted to give that to Rose,—she took care of him and he wanted to give it to her ; that then Martin asked him if he could sign it, and he said he could ; that he leaned out of bed and signed it on a chair ; that Mr. Ryan took the will and placed it on a table in the same room, and signed it, and that Mr. Devine signed it also at the same time ; that the whole execution, including the signing by the witnesses, did not take over five minutes, and that he is sure that Devine was present in the small room when the testator signed.

Dr. Archer dictated the will to Martin, according to instructions given to him by the testator, and was present when the will was read over to the testator ; but he does not think that he was present when it was executed, while Ryan and Martin both think that he was.

The testimony is not as satisfactory as it might be, but the weight of it is in favor of a proper execution of the will. The fact, which is the least satisfactorily proved, is the signing of the will by the testator in the presence of both witnesses.

Devine will not say positively that he was not present

when the will was signed, while Ryan and Martin are both sure that he was, although one says that he was in the small bedroom where the will was signed, and the other that he was standing in the door-way, from where he could see and hear all that was going on at the testator's bedside, the bedroom being very small. Both Martin and Ryan also agree that, after the will was read to the testator, it was signed by him, and then by the witnesses. I understand from the testimony that one act followed the other, without delay or interruption; Martin says the whole thing took about five minutes, and Devine says that he was not in the room more than ten or fifteen minutes altogether; so that, if he was present, as he admits, when the will was read to the testator, and after that signed it as a witness, he must have been also present when the testator signed. He does not say that he was not present, but only that he did not see the testator sign. It was not necessary that he should actually see him sign. If he was in the same room with him, or in the adjoining room, in such a position that he could see him sign, after his attention had been drawn to what was going on, the signing will be considered to have taken place in his presence, particularly as, on further examination, he says that he does not remember whether or not he saw the testator sign the will (*Redf. on Wills*, ch. 6, 218, as to the meaning of the word "presence;"; *Matter of Gilman*, 38 *Barb.*, 364; *Peck v. Cary*, 27 *N. Y.*, 9, 25, 29, 30, 38).

Upon the whole, I think the proper execution of the will is proved, within the decisions in the following cases: *Vaughan v. Burford* (3 *Bradf.*, 78); *Belding v. Leichardt* (2 *Sup. Ct. [T. & C.]*, 52); *Thompson v.*

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Stevens (62 *N. Y.* 634); Coffin v. Coffin (23 *Id.*, 9); Peck v. Cary (*supra*); Matter of Gilman (*supra*).

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE—
September, 1881.

MILLER v. WHITE.

In the matter of the probate of the will, and a codicil thereto, of ANNA M. WHITE, deceased.

The burden of proving that a testator was not of sound mind at the time of the execution of a will, rests upon the one contesting the probate; so that if, upon the whole evidence, that fact remains doubtful, the will cannot be rejected on that ground.

Where a will is made in a sound state of mind, and is subsequently revoked without the slightest evidence of any change of purpose, or any ground for it, after the testator has shown signs of breaking up mentally, the revocation may be attributed to delusion.

The testatrix, in 1877, made a will, giving to her niece, who was her only next of kin, and of whom she had always been fond, certain legacies and an annuity of \$1,000. In 1878, signs of mental disturbance began to be noticeable in testatrix, including a great change for the worse in her personal habits, conduct and feelings, she becoming untidy, morose, unsociable, and subject to delusions, in particular taking a great and causeless dislike to her niece, suspecting the latter's motives in visiting her, declaring that she hated her, and even accusing her of pilfering. In March of that year, after the appearance of these symptoms, testatrix executed a codicil for the sole purpose of revoking all the provisions in her will, made in behalf of her niece. Experts and one of the subscribing witnesses testified to an impairment of testatrix's faculties, occurring after the will was executed.

Held, that, although the mental deterioration testified to might not have deprived testatrix of the moderate degree of capacity necessary to enable her to make a testamentary disposition, the codicil must be refused probate, as being the direct offspring of an insane delusion, on her part, in respect to her niece.

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APPLICATION by R. C. White, executor, etc., for the probate of a will and codicil. The contestant, Josephine Miller, opposed the probate only of the latter instrument. One attesting witness to the codicil thought the testatrix of sound mind at the time of its execution ; but the other witness was of a contrary opinion. The contestant claiming that the burden of proof was on the proponent, the matter was submitted, with the understanding that, if the court found against the contestant, she should be allowed to put in proofs.

L. BENNETT, *for proponent.*

L. MARCELLUS and CHAS. BRADSHAW, *for contestant.*

THE SURROGATE.—As the evidence now stands, the will and codicil must be admitted to probate. The *onus* of proving that the testatrix was not of sound mind when she executed the codicil, rests on the contestants. It may be that it is expected of the party offering a will for probate, that he will examine the subscribing witnesses, as to the condition of the testator's mind, but that does not relieve the contestants of the burden of proving that it was unsound ; so that if, upon the whole evidence, that fact remains doubtful, the will cannot be rejected on that ground (*Redf. Prac.* [2 ed.], 215, 216 ; *Redf. Am. Cas. on Wills*, 28, note ; 1 *Redf. on Wills*, 46 ; *Dayton on Surrog.* [3 ed.], 57, 175 ; *Delafield v. Parish*, 25 *N. Y.*, 72, 97 ;* *Jackson v. King*, 4 *Cow.*,

* The following are extracts from a communication by THOMAS G. SHEARMAN, Esq., to the Albany Law Journal, July 16, 1881:

"I speak doubtfully concerning the Parish will case, because it is by no means easy to tell what legal principles were decided in it. One judge read an opinion holding that the sanity of the testator had been left in great doubt, and that the will should therefore be rejected; and in this four

207; *Ean v. Snyder*, 46 *Barb.*, 232; *Brown v. Torrey*, 24 *Id.*, 583).

Subsequently, further evidence having been adduced,

judges concurred. Three judges held that the testator was sane. One of these laid down the abstract proposition that the burden of proof, as to insanity, was upon the opponents of a will; and in this dictum four judges concurred. But dicta do not make law; and the evident fact that the will was rejected because the court remained in doubt as to whether the testator was sane or insane, makes this case, in my opinion, an authority against the dictum.

"The precise point has not again come before our court of appeals; but in *Rollwagen v. Rollwagen* (63 *N. Y.*, 504), the court unanimously held that a will made by a testator of unquestioned sanity must be rejected because he labored under some infirmities which left it doubtful whether he fully understood the effect of its provisions; the court saying that in such cases the proof that the testator 'understood and assented to' such provisions 'should be quite clear and satisfactory before it should be admitted to probate.' And the court cited the opinion of DAVIES, J., in *Delafield v. Parish*, with approval; that opinion being the one in which it was held that the burden of proof as to the sanity of the testator was upon the proponent of the will. Surely, if the burden of proof is cast upon the proponent to show that a sane but sick testator fully understood the will, the court would not admit a will to probate upon evidence equally balanced, as to the testator having mind enough to understand anything. The earlier decisions, as Judge DAVIES showed in his opinion, hold that the burden of proof is upon the proponent in this respect. Judge GOULD, in his dissenting opinion, relied upon the general rules of evidence in relation to contracts and other acts between living persons.

"Finally, let us ask what practical experience tells us is, and what reason tells us should be, the actual law in this matter. . . . Is there any Surrogate who admits a will to probate without asking the subscribing witnesses whether the testator appeared to be of sound mind? The Surrogates of New York and Kings County certainly do not. . . . Would he (the Surrogate) have accepted a will if, when he asked the witnesses whether the testator was of sound mind, they had replied that it was none of his business, or even that they were utterly unable to say whether he was or not? If the evidence is so conflicting that the Surrogate is utterly unable to determine whether the testator was insane or not, shall he sustain the will? Would the general term sustain him if he did? If the case is sent to a jury and they all come into court, saying that the mind of every one of them is evenly balanced on the issue of sanity, would the court direct them to give a verdict in favor of the will? If not, why not?

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the Surrogate delivered the following opinion, wherein the facts sufficiently appear.

THE SURROGATE.—In September, 1877, the testatrix

"A little thought shows that there is a great deal of difference between a will and a contract. The business of life cannot go on without contracts; but it can go on perfectly well without wills. The law makes a will for every man, which is generally better than any he can make for himself. Contracts are matters of natural right, recognized by common law. Wills are matters of artificial right, dependent upon statutes. No man has any real interest in his property after his death; and experience has shown so strongly the danger of allowing men to tie up property after their death, that their power to do so is hedged about with many restrictions. The presumption is that every will is unjust; for it always makes some disposition of property which is contrary to the general experience of mankind, as embodied in the law. Of course the circumstances of each case may remove this presumption; but it is only reasonable to refuse to give effect to such dispositions of property, so long as any doubt remains as to the perfect soundness of mind of the testator. And for this reason the law sets aside wills on a degree of proof, either as to sanity or undue influence, which would make no impression in an action to set aside a contract.

"I am aware that this doctrine is not universal law, and that in Pennsylvania, Maryland, Delaware, Kentucky, and perhaps New Jersey and other States, the proponent of a will is not required to give any evidence as to the testator's sanity. But he is in New York, as is conceded by the last case in which it is said that the burden of proof is not on him (*Harper v. Harper*, 1 *N. Y. Sup. Ct.*, 351, 355); and it is the settled rule in Great Britain and Ireland, Maine, New Hampshire, Massachusetts, Connecticut, Georgia, Illinois and Michigan, that a will cannot stand if the testator's mental capacity is left in grave doubt (*Barry v. Butlin*, 2 *Moore's P. C.* 480; *Baker v. Batt*, *Id.*, 317; *Sutton v. Sadler*, 3 *C. B. [N. S.]*, 87; *Symes v. Green*, 1 *Swaby & T.*, 401; *Keays v. McDonnell*, 6 *Irish Rep. Eq.*, 611; *Robinson v. Adams*, 62 *Maine*, 369; *Cilley v. Cilley*, 34 *Id.*, 162; *Boardman v. Woodman*, 47 *N. H.*, 120; *Perkins v. Perkins*, 39 *Id.*, 163; *Crowninshield v. Crowninshield*, 2 *Gray*, 523; *Baldwin v. Parker*, 99 *Mass.*, 79; *Comstock v. Hadlyme*, 8 *Conn.*, 261; *Potts v. House*, 6 *Ga.*, 324; *Rigg v. Wilton*, 13 *Ill.*, 15; *Taff v. Hosmer*, 14 *Mich.*, 309; *Kempsey v. McGinnis*, 21 *Id.*, 123, 147; *Aiken v. Weckerly*, 19 *Id.*, 482, and other cases). And although the earlier decisions in Vermont in the time of Chief Justice I. F. REDFIELD were to the contrary, they have been overruled in that State, and the British doctrine followed (*Williams v. Robinson*, 42 *Vt.*, 638). Being confident that this is the law of New York, I think . . . too, that this was the rule actually applied in *Delafeld v. Parish*."

See, also, *Dickie v. Van Vleck*, *ante*, 284, at p. 286.

made a will, whereby she gave to Josephine Miller certain legacies, and also gave to her executor the sum of \$40,000, in trust for certain designated purposes ; among others, to pay from the interest of said fund \$1,000 a year to the said Josephine Miller. It is conceded that, up to that time, the testatrix was of sound mind, and no question is raised as to the will.

In March, 1878, the testatrix executed a codicil, for the only purpose of revoking all the foregoing legacies to Miss Miller. It is this codicil that is contested. Its execution has been proved, and there is no evidence that it was obtained through undue influence ; but the contestant claims that, shortly after the execution of the will, the testatrix's mind began to fail, and that, at the date of the execution of the codicil, she was of unsound mind.

The evidence shows that Miss Miller was her niece, and her only heir and next of kin at the time the codicil was executed. The testatrix had always been fond of her, and treated her well and kindly up to the year 1878, when signs of mental disturbance began to manifest themselves in the testatrix, and a great change was noticeable in her conduct and feelings. Whereas she had formerly been neat and particular in her personal appearance, hospitable and generous in her way of living, lady-like, sociable and agreeable in her intercourse with others, now she was careless and slovenly, mean and close, vulgar, averse to company, abusive and suspicious. She also had delusions, believing that she saw people who were dead or not present. She took a great dislike to her niece, Miss Miller, and began to suspect her motives in visiting her, and even her honesty, accusing her of carrying off things in her pockets.

Eliza Marsh, one of the witnesses to the codicil, says that she does not think that the testatrix was competent to make it ; that she had a fall in 1878, and never was in her right mind after that. It is true that the weight of this witness's opinion is much impaired by the fact that she was a witness to the codicil, and that she offers no explanation of the inconsistency between her opinion as to the soundness of the testatrix's mind and her willingness to act as a witness to the codicil ; but she gives the facts on which she bases her opinion, and the well-known and very competent experts who were examined, are also of the opinion that the testatrix's mental faculties had become impaired ; but whether to the extent of depriving her of that moderate degree of capacity necessary to enable her to make a will is not so clear (*Delafield v. Parish*, 25 *N. Y.*, 9). It might well be, therefore, that the codicil should not be set aside, were it not clear that it was the direct result of delusion on the part of the testatrix respecting her niece (*Seamen's Friend Society v. Hopper*, 33 *N. Y.*, 619, 625 ; *Dunham's Appeal*, *Redf. Am. Cas. on Wills*, 93). Absurd prejudices, groundless antipathies, silly and chimerical hatreds, originating in acknowledged insanity, are evidences of the existence of delusion (*Boyd v. Eby*, *Redf. Am. Cas. on Wills*, 218, 222). Insane delusion may exhibit itself by hating, without cause, persons formerly loved (Head-note to *Bitner v. Bitner*, *Redf. Am. Cas. on Wills*, 751, 752) ; and where a will is made in a sound state of mind, and is subsequently revoked without the slightest evidence of any change of purpose, or any ground for it, after the testator has shown signs of breaking up mentally, the

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revocation may be attributed to delusion (Note to Duffield v. Morris, *Redf. Am. Cas. on Wills*, 206, 217).

In the principal case, there is absolutely nothing to account for this codicil, but the dislike taken by the testatrix to her niece, without any apparent cause whatever, after the testatrix's mental faculties had become impaired, and which must be attributed to delusion,—delusion evidenced not only by the sudden and unaccountable change of feeling on the part of the testatrix towards her niece, but by the testatrix's own declarations, to the effect that she hated her niece, that her niece came to see her to take things away, and that she carried them away in her pockets. A decree, admitting the will to probate, and rejecting the codicil, may be submitted.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
September, 1881.

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*In the matter of the probate of the will of BERNARD
GILLAN, deceased.*

The Code of Civil Procedure has no application to proceedings for probate, commenced by service of the citation on all the necessary parties in 1872.

The administrator of a mortgagee, in a mortgage executed by a devisee under a will, is a "person interested in the estate," within *Laws* 1837, ch. 460, § 4, and might "have such will proved before the proper Surrogate." He might, therefore, also intervene and ask to be made a party to proceedings instituted for its probate.

It seems, that section 2617 of the Code of Civil Procedure, giving such right of intervention to any person "interested in sustaining or defeating the will" merely formulates the pre-existing law.

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One who has not been formally made a party to probate proceedings cannot make any motion therein.

It seems, that such proceedings do not abate by the death of all the parties, but may be revived by bringing in the successors to the rights and interests of the deceased parties.

THIS was an application to revive and continue proceedings for the probate of the will of decedent.

The petition of John Lafferty showed that proceedings for the probate of the will of Bernard Gillan were commenced, in January, 1872, by Anthony Gillan, one of the executors named in the will; that Mary Gillan, the widow, and Sarah Lafferty, the only heir and next of kin of the decedent, were made parties thereto; that one witness was examined on January 22, 1872, and nothing further was done; that the testator died in December, 1871, and by his will, after giving several small legacies, devised and bequeathed all the residue and remainder of his property, real and personal, to his wife; that the said Mary Gillan, on January 2, 1872, mortgaged to Michael Lafferty a certain piece or parcel of land which had been devised to her by the will, to secure the sum of \$400; that, of the parties to the proceedings for probate, Mary Gillan and Sarah Lafferty are dead;—it not appearing whether Anthony Gillan is dead or alive, nor whether Thomas Gibney, the other executor of the will of Bernard Gillan, is living, nor who are the respective executors or administrators of Mary Gillan and Sarah Lafferty; that Annie Lafferty, a daughter of Sarah Lafferty, and the wife of the petitioner, is the only heir and next of kin of Mary Gillan and of Sarah Lafferty; that Michael Lafferty, the mortgagee, is dead, and the petitioner is the administrator of his effects. The prayer of the petition was that a citation issue to the said Annie

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Lafferty, to attend the continuation of the proceedings heretofore instituted for the probate of the last will and testament of Bernard Gillan.

M. F. McGOLDRICK, *for petitioner.*

THE SURROGATE.—The probate proceedings having been commenced by the service of the citation therein on all the necessary parties in 1872, the Code has no application to them (§ 3347, subd. 11; § 3348).

The petitioner's intestate was not a party to the proceedings and the question suggests itself whether the petitioner can make himself a party to them and ask that they be continued. Under the act of 1837, in force before the Code, an executor, devisee or legatee named in any last will, or *any person interested in the estate*, might have such will proved (L. 1837, ch. 460, § 4). The petitioner in this case is neither an executor, devisee nor a legatee named in the will of Bernard Gillan, but he may be said to be a person interested in his estate. He is the legal owner of a mortgage on real estate which passes under Gillan's will, and as such has an interest in having said will proved. True, this mortgage has been executed since Gillan's death, by his devisee, but that is immaterial; the object of the statute is to give the right to have the will proved to every person who is interested in having that done, by reason of his interest in the property which is the subject of the will, and that object would be frustrated in many instances, if the right given by the statute were limited to those having an interest in the property at the time of the death of the testator.

Take this very case: there is no one but the petitioner and the persons interested in the estate of his

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intestate, who appear to have any interest in having Bernard Gillan's will proved.

As a person who may have the will proved under the statute before cited, the petitioner clearly has the right to ask to be allowed to intervene and become a party to the proceeding for the probate of the will, for the purpose of protecting his own interests (*Booth v. Kitchen*, 7 *Hun*, 255, 259, 260, 264; *Walsh v. Ryan*, 1 *Bradf.*, 433; *Marvin v. Marvin*, 11 *Abb. N. S.*, 97; *Children's Aid Society v. Loveridge*, 70 *N. Y.*, 387, 391; *Turhune v. Brookfield*, 1 *Redf.*, 220).

Section 2617 of the Code expressly gives that right to any person interested in sustaining or defeating the will, and I do not understand it as laying down a new rule, but only as formulating in this respect the law, as it existed before the Code went into effect.

But, as was held in *Foster v. Tyler* (7 *Paige*, 48, 52), the petitioner must first become a party to the proceedings, before he can make any motion or take any steps therein. To that end, he must amend the prayer of his petition, and ask to be allowed to intervene and become a party to the proceedings to prove the will of Bernard Gillan, and upon the petition so amended, an order will be made accordingly.

As I have said before, it does not appear whether the executor Anthony Gillan is dead or alive, but all the other parties to the proceedings are dead, and the next question therefore which presents itself is whether the proceedings for the probate of Bernard Gillan's will have abated or can be revived and continued. The authorities hold that they do not abate, but that they may be revived and continued by bringing in the persons who

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have succeeded to the rights and interests of the deceased parties (*Van Alen v. Hewins*, 5 *Hun*, 44; *Redf. Prac.*, [2 ed.], 100). The petitioner, therefore, after having made himself a party to the proceedings for the probate of the will of Bernard Gillan, will be in a position to make a motion in said proceedings, upon the proper petition, asking that they may be revived and continued, and that the successors in interest, personal representatives and heirs (naming them) of the deceased parties may be cited to appear and attend the probate of said last will and testament (*Van Alen v. Hewins*, 5 *Hun*, 44, 47). Of course, Anthony Gillan, if living, must have due notice of such motion, as he is a party to the proceedings.

Ordered accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
October, 1881.

HARWARD v. HEWLETT.

In the matter of the judicial settlement of the account of WILLIAM M. HEWLETT, executor, etc., of SARAH HAYRE, deceased.

The testator, by his will, gave to his granddaughter, an infant, a legacy of \$1,000, to be paid to her at majority; in case she died in infancy, one-half of that sum to go to her mother. He bequeathed the residue of his estate to a nephew. The granddaughter claimed to be entitled to interest on her legacy until her majority. There was no evidence that testator had assumed the relation of a parent towards her. *Held*,

1. That the testator being neither the father of, nor one *in loco parentis* to the legatee, she was not within the exception which allows, in such cases, where the will makes no provision for the infant's support, interest on a legacy before the time when the latter becomes payable.

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2. That interest on the \$1,000, during the legatee's infancy, belonged to the residuary estate.

The costs of an accounting by an executor, etc., have no place in the account *filed in that proceeding*, as they must first be fixed by the decree. Charges for counsel fees, paid on the accounting, should be separately stated, and accompanied with an affidavit showing conformity to Code Civ. Pro., § 2562.

APPLICATION by executor, for the judicial settlement of his account, and for distribution of the surplus in his hands. Isabella Harward, an infant legatee, and others, were cited and appeared on return of the citation.

The account contained a charge of \$75 for expenses of final accounting and services rendered to the executor by his attorneys.

The testator, by his will, gave to his granddaughter all his clothes, bed and bed-clothes, and a legacy of \$1,000, to be paid to her at the age of twenty-one years; but, in case she should die before arriving at that age, he gave to her mother, from that money, the sum of \$500. All the rest and residue of his property he gave to his nephew, Moses J. Hendrickson.

The granddaughter, an infant, claimed, by her special guardian, that she was entitled to interest on her legacy until she attained the age of twenty-one.

MORRIS & PEARSALL, *for executor.*

C. J. MORITZ, *special guardian for infant legatee.*

THE SURROGATE.—As a general rule, a legacy only draws interest from the time it becomes payable, unless it is otherwise expressed in the will.

To this rule there are several exceptions, and one is

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where the testator was the parent, or stood in the relation of parent, to the legatee, and such legatee is an infant, and has no other provision nor any maintenance, in the meantime, allotted by the will. The rule is based upon the presumption that the testator, in such case, must have intended that the legatee should in the meantime be maintained at his expense, thus discharging his moral obligation or carrying out his benevolent design (*Brown v. Knapp*, 17 *Hun*, 160 ; 79 *N. Y.*, 136, 141 ; *Wms. on Ex'rs.* [2d ed.], 1538, 1539).

In the principal case, the testator was not the father of the legatee, and there is nothing to show that he had assumed the relation of a parent towards her ; the case is not therefore brought within the exception to the general rule above referred to.

The legatee having no claim to the interest accruing on her legacy while she remains an infant, it belongs to the residuary legatee, who is entitled to all personal property, including all interest made on the estate, not disposed of by the will (*Wms. on Ex'rs.* [2d ed.], 1568 ; *McLoskey v. Reid*, 4 *Bradf.*, 334, 339, 340).

The vouchers must be filed, before the disbursements charged in the account can be allowed, and the *costs* of this accounting have no place in the account, as they must first be fixed and allowed by the decree. If any charge is made for *counsel fees* paid in this proceeding, it should be separately stated, so that the court may judge whether it exceeds the limit fixed by section 2562 of the Code ; and there should be proof by affidavit of the number of days necessarily occupied in preparing the account for settlement, which, in this case, judging from

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an inspection of the account, cannot probably exceed one day.

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
October, 1881.

MATTER OF HUDSON.

In the matter of the estate of HENRY C. HUDSON, deceased.

Where an application is made, pursuant to Code Civ. Pro., § 2695, for ancillary letters under a will proved in a court of another State, by whose laws wills are admitted by the oral direction of the court, without any written "judgment, decree or order,"—that fact should appear by the certificates of exemplification, or, if such a certificate is refused, then by the affidavit of a person having knowledge of those laws.

It seems, that a will proved before the Surrogate of a county of the State of New Jersey,—it appearing, by the certificate of the Secretary of that State, that such Surrogate has jurisdiction, and that he is *the clerk* of the orphan's court of his county, which is a court "duly constituted," etc. (Code Civ. Pro., § 2705), may, by a liberal construction, be deemed to have "been admitted to probate by a competent court," within the meaning of Code Civ. Pro., § 2695; the authorized and authenticated act of the clerk, an officer and component part of his court, being considered as performed by the latter.

THIS was an application by Wm. H. Brokaw, for ancillary letters testamentary, under the will of decedent. The facts appear sufficiently in the opinion.

SULLIVAN & CROMWELL, *for petitioner*.

THE SURROGATE.—There is a difficulty in the way of granting the decree asked for, to which I called attention when these papers were before me on a former occasion.

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No exemplified copy of the judgment, decree or order admitting the will to probate has been presented to this court, as required by § 2695 of the Code. If, under the laws of the State of New Jersey, where the will was proved, no such written judgment, decree, or order is made, but wills are admitted to probate on the mere oral direction of the court, that fact should appear by the certificates of exemplification, or, if the officials signing said certificates refuse to certify to that fact, then by the affidavit of some person having knowledge of the laws of New Jersey.

It must also be shown that the will was admitted to probate by a court duly constituted under the laws of New Jersey (Code, §§ 2695, 2705). It appears, by the record of the proceedings and the certificates of exemplification, that the said will was proved before the Surrogate of Union county; he is nowhere described or spoken of as the judge of a court; on the contrary, the Secretary of State, who is to certify that the court, by which the will was admitted to probate, was properly constituted (Code, § 2705), certifies that the Orphan's court of Union county is a duly constituted court under the laws of the State of New Jersey, and that the Surrogate of said county is also the clerk of said Orphan's court. He further certifies that the said Surrogate had jurisdiction to admit wills to probate, and to grant letters testamentary thereon, and that the seal of the said court is the seal of the said Surrogate.

At first, I had doubts whether it could be said that the will had been admitted to probate by a court; but further reflection has satisfied me that under a liberal construction of the above sections of the Code, which

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construction is entitled to prevail, the will may be considered as having been admitted to probate by the Orphan's court acting through its clerk, the Surrogate of the county. Mr. Burrill, in his work on Practice, enumerates, among the circumstances essential to the existence of every court, that it should possess the proper officers to aid it in the performance of its duties (vol. 1, p. 35). In this case, the court was by law constituted with the Surrogate of the county as its clerk. He therefore became a constituent part of the court, as well as its judges; and in the exercise of the powers expressly conferred upon him in his official capacity, his acts may well be considered the acts of the court, when such a construction is necessary to facilitate the administration of justice.

Thus it is that, by degrees, under the common law of practice, many acts which originally emanated directly from the courts, and took place in their immediate presence, came to be performed by the clerks exclusively in their offices (*Burrill's Practice*, 40).

If the laws of New Jersey had conferred upon each of the judges of the Orphan's court the same jurisdiction, to admit wills to probate, which it has conferred upon the Surrogate, there would be little doubt that a will admitted to probate by one of said judges would be considered as having been admitted to probate by the court, within the meaning of § 2695 of the Code. The Surrogate, as we have seen, is a constituent part of the Orphan's court, as well as its judges, and the admission of the will to probate by him must be viewed in the same light.

Ordered accordingly.

M'CUE v. O'HARA.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
October, 1881.

McCUE v. O'HARA.

*In the matter of the probate of the will of MARY
O'HARA, deceased.*

The Surrogate's court has power, independently of statute or Rule, to allow to the guardian *ad litem* of an infant party, a reasonable compensation for his services. This power is recognized by the Code of Civil Procedure, and the rules of court (§ 17; rule 50).

Section 2558, subd. 3, of that Code, which excepts an infant's guardian from the prohibition to award costs to an unsuccessful contestant of a will, does not limit such compensation to the taxable costs.

MOTION by Alexander McCue and another, executors, etc., of decedent, to strike from a decree on probate an allowance to the special guardian of Mary C. O'Hara, an infant party, beyond the amount of taxable costs.

W. N. DYKEMAN, *for the motion.*

THOMAS E. PEARSBALL, *special guardian for infant.*

THE SURROGATE.—It is conceded that this court has the power to make an allowance to the guardian *ad litem* for an infant (*Redf. Prac.* [2 ed.], 769). The power exists, independently of any express provision of law, or rule of court, but it is recognized by the general rules, which are applicable to all courts of record (*Code*, § 17; rule 50). The amount allowed is to be a reasonable compensation for the services rendered. Sometimes the taxable costs are given, when they are deemed sufficient; very often a larger amount. It has never been understood that the provisions of the Code, which recognize

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the right of guardians *ad litem* to be allowed costs, had the effect of limiting their compensation to the taxable costs. No such construction has ever been given to section 474, which speaks of the costs and expenses allowed to the guardian by the court, and it cannot justly be claimed for section 2558, subd. 3, which excepts an infant's guardian from the effect of the prohibition to the court to award costs to an unsuccessful contestant of a will.

The motion is denied.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
November, 1881.

CARROLL v. HUGHES.

*In the matter of the judicial settlement of the account
of JAMES HUGHES, administrator, etc., of PETER
HUGHES, deceased.*

An administrator, etc., is not entitled to his commissions until they have been allowed by the Surrogate.

A party objecting to an account must sustain his objections by proof, before they can be allowed.

Charges for legal services, rendered to an administrator, etc., upon an accounting, must be separately stated, and accompanied with an affidavit showing conformity to Code Civ. Pro., § 2562.

In the absence of proof to the contrary, the laws of a sister State are presumed to be the same as our own.

Where there are several administrations on the estate of a decedent, the one granted in the country of his domicile is the principal one, and the others are ancillary.

The decedent died intestate while domiciled in the State of Pennsylvania, leaving next of kin in New York and in Ireland, and creditors but no next of kin in the State of his domicile. His brother, J., residing in this State, took possession of the bulk of decedent's personal property in

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Pennsylvania, amounting to about \$30,000, brought it to this State and obtained letters of administration here, on the ground of assets arriving here after decedent's death. Subsequently C. was appointed administrator, etc., of decedent in Pennsylvania, and, having intervened in the accounting of J., alleged that the latter had taken possession of the property wrongfully, and for the purpose of defrauding decedent's creditors in Pennsylvania, objected to the allowance of any of the credits in his account, and prayed for an order compelling the return of the property to the last-named State. J. was examined, and denied any fraudulent intent. *Held*,

1. That the validity of J.'s appointment could not be questioned on the accounting; and that, having rendered services, he was entitled to his expenses and commissions.
2. That the custody and distribution of decedent's estate belonged to the administrator appointed in the State of his domicile, whose title related back to the death, and therefore
3. That J. had no right to withdraw the assets from Pennsylvania, the creditors in that State having the right to administration thereof under their local laws; and that the balance of assets in J.'s hands, after settlement of his account, must be remitted to C., upon proper security.

APPLICATION by administrator for the judicial settlement of his account.

The facts appear sufficiently in the opinion.

WILLIAM FULLERTON and GEORGE L. FOX, for *James Hughes*.

A. J. DELANEY, for *Rev. Matthew Carroll*.

WILSON DURACH, for *Jane McKeever*.

THE SURROGATE.—This is an application on the part of James Hughes, who was appointed by this court administrator of the credits and effects of his brother, the Rev. Peter Hughes, deceased, for a judicial settlement of his accounts.

The Rev. Peter Hughes was domiciled, at the time of his death, in the borough of Braddock's, near Pittsburgh, in the county of Alleghany, State of Pennsylvania. He left next of kin in the State of New York and

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in Ireland ; but none in the State of Pennsylvania. His brother, James Hughes, who was at the time a resident of the city of Brooklyn, went to Braddocks, shortly after the death of Peter Hughes, and, taking possession of the bulk of the deceased's personal property, amounting to about \$30,000, brought it back with him to the city of Brooklyn, and on January 5, 1880, obtained letters of administration of the credits and effects of Peter Hughes from this court, alleging that assets of the said Peter Hughes had come into this county after his death.

Later, James Hughes obtained possession of certain Pittsburgh water bonds, of the par value of \$4,000, which he claims as his own.

On January 12, 1880, Rev. Matthew Carroll was appointed, in Pittsburgh, administrator of the property of the deceased ; and, having been allowed to intervene and make himself a party to this accounting, he has filed objections to James Hughes's account, claiming, among other things, that he should be charged with the said Pittsburgh water bonds, as part of the estate of Peter Hughes ; that he wrongfully and fraudulently took possession of the property of Peter Hughes, and that, as a consequence of so doing, none of the payments credited to him in his account should be allowed. The said Matthew Carroll also filed a petition in these proceedings, verified by his attorney, as he was absent from the State, representing that James Hughes had removed the property of the deceased to the State of New York with intent to defraud the creditors of the deceased residing in the State of Pennsylvania ; that they had applied to the authorities, at the place of domicile of the deceased, to compel him, Carroll, to follow James Hughes into the State

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of New York, and there invoke the law of said State in their behalf, to compel a return of the said property to the domicile of the deceased ; and praying for an order to that effect.

Jane McKeever, one of the heirs and next of kin, also insists that James Hughes should be charged with the Pittsburgh water bonds, and objects to the allowance of the amounts credited in the account, for commissions and counsel fees, as being excessive.

James Hughes was examined, and it appears by his testimony that, in taking possession of the property of his brother Peter, he acted under the advice of counsel, who told him that he had a right to secure the property and bring it to Brooklyn, and to administer on it here ; that the Rev. Matthew Carroll became the administrator, at the domicile of the deceased, at the request of James, who became one of the sureties on Carroll's administrator's bond ; that James knew that there were unpaid creditors of the deceased in Pittsburgh, but left property in Pennsylvania, which, he was subsequently informed, was sufficient to pay all the debts of the deceased and leave a surplus ; that the Pittsburgh water bonds belonged to James ; that they stood in his name individually, and represented an investment of his own money, made for him by his brother.

James Hughes was regularly appointed administrator ; his letters have never been revoked ; the validity of his appointment is not questioned, and cannot be, in this proceeding (*Roderigas v. East River Sav. Inst*, 63 *N. Y.*, 460) ; he has acted as such administrator for over eighteen months, and now, when he asks to have his account judicially settled, he is entitled to credit himself

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with the expenses of administration (*Redf. Prac.* [1 ed.], 393), and to be allowed his commissions (*King v. Talbot*, 40 *N. Y.*, 76, 96).

It is unnecessary to consider what would be the result, if there were not sufficient assets to pay the creditors in full, or if the next of kin objected to the allowance of these commissions and expenses of administration, on the ground that they would have been saved to the estate but for the wrongful act of James, as it is not pretended that the estate is insolvent, and the next of kin have all been made parties to this proceeding, and none of them object to the charges, except Jane McKeever, and her objection does not raise the question, it being only to the amount charged (*Boughton v. Flint*, 74 *N. Y.*, 476, 485).

The administrator, however, is not entitled to receive his commissions until they shall have been allowed by the Surrogate (*Freeman v. Freeman*, 4 *Redf.*, 211, 215); but he testified that he had not yet taken them.

The objections relating to the Pittsburgh water bonds, and the amount paid for lawyers' fees, must be overruled. Persons objecting to an administrator's account must sustain their objections by proof, before they can be allowed (*Redf. Prac.* [2 ed.], 673; *Boughton v. Flint*, 74 *N. Y.*, 476, 485; *Bainbridge v. McCullough*, 3 *S. C.* [*T. & C.*], 486). In this case, there is no proof that the Pittsburgh water bonds belonged to the estate of Peter Hughes; on the contrary, whatever proof there is, on the subject, is the other way. Neither is there any proof that the charge for legal services is excessive; but so much of it as relates to this accounting must be separately stated, so that the court may judge whether it exceeds

the limit fixed by section 2562 of the Code, and there should be proof by affidavit of the number of days necessarily occupied in preparing the account for settlement.

In the absence of all proof to the contrary, the laws of Pennsylvania must be presumed to be the same as our own (*Monroe v. Douglass*, 5 *N. Y.*, 447).

When, therefore, Peter Hughes died in Pennsylvania, the State of his domicil, the custody, management and distribution of his personal property in that State were, by law, exclusively committed to the person who might be appointed there, by the proper court, the administrator of his credits and effects (*Dayton on Surrog.* [2 ed.], 208; *Schultz v. Pulver*, 11 *Wend.*, 361, 363; *Lawrence v. Elmendorf*, 5 *Barb.*, 73, 76; *Wms. on Ex'rs.*, 291, note o; 3 *Redf. on Wills*, 12, 26, 28). When such administrator was subsequently appointed, the title to such property vested in him and related back to the death to the testator (*Schultz v. Pulver*, *supra*). James Hughes, in the meantime, had no right to interfere with the property, except perhaps for the purpose of securing it for the administrator, if it was in danger of being lost. The withdrawal of the assets of the deceased from the State of Pennsylvania was in violation of the rights of the creditors of the deceased in that State; they had the right to have the assets within the State administered under the authority of the local jurisdiction in which they were situated, and should not be subjected to the injustice and inconvenience of seeking satisfaction of their debts in the State of New York (*Lawrence v. Elmendorf*, 5 *Barb.*, 73, 76; *Dawes v. Head*, 3 *Pick.*, 128; 3 *Redf. on Wills*, 26, 27).

Where there are several administrations, the one granted in the country of the deceased is the principal one, and that granted in any other country is merely ancillary or auxiliary to it (*Wms. on Ex'rs.*, 430, note g ; 3 *Redf. on Wills*, 26). Those charged with the ancillary administration are liable to account, in the country where it was granted, for all the assets collected there under it, and, after paying from said assets all the debts due to resident creditors, and the proper commissions and expenses of administration, the balance may be ordered, in the discretion of the court before which the accounting is had, either to be distributed to the persons entitled thereto or to be remitted to the place of domicile of the deceased, to be there distributed by the principal administrator (*Parsons v. Lyman*, 20 *N. Y.*, 103 ; *Despard v. Churchill*, 53 *N. Y.*, 192).

But in the principal case, the assets were originally at the place of the deceased's domicile in Pennsylvania, where they should have been administered ; instead of that, they were illegally removed from there to this State, in violation of the rights of the creditors of the deceased residing in the former State, although there is no proof that the removal was with intent to defraud said creditors. The principal administrator asks to have the assets, in the hands of the administrator appointed here, remitted to the place of the deceased's domicile, representing that he requires those assets to pay numerous creditors of the deceased, and his request should be granted.

The balance of assets remaining in the hands of the administrator here, after settling his account, must be remitted to the administrator at the place of domicile of the deceased, on proof that the security which he has

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given there is sufficient to cover the additional amount of property which will thus come into his possession, and if not, then on his giving such additional sufficient security, to be approved by the court by which he was appointed administrator.

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
November, 1881.

SCHUTZ v. STUTZER.

In the matter of the judicial settlement of the account of HERMAN STUTZER, executor, etc., of AUGUSTUS J. G. SCHUTZ, deceased.

The testator, by his will, gave to his wife an annuity of "fifteen hundred dollars, United States currency, the United States currency to be calculated at the rate of one hundred and ten dollars currency for every one hundred dollars United States gold, if, at the time when the above payments commence, specie payments should have been resumed, and also if gold should have gone higher." Specie payments were resumed before payment of the annuity commenced. The executor having paid to the widow \$1,610 per annum, on his accounting the next of kin objected that the payment should have been \$1,500 per annum. *Held,*

1. That the intent of the testator was that, if currency remained below par and above a point at which gold was estimated at 110, the widow should receive \$1,500 in currency, per annum, but that, if currency rose to par or depreciated below the point at which gold was estimated at 110, she should receive the equivalent of \$1,363.64 in gold.
2. That, specie payments having been resumed, the annual payment should have been the last-named sum, and that the excess paid by the executor should be charged to him, with interest, and he be allowed to deduct the same from future payments of the annuity.

APPLICATION, by Herman Stutzer, executor, etc., of decedent, for the judicial settlement of his account. The

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widow, Elizabeth P. Schutz, and the next of kin of the testator, were cited to appear on the settlement.

The testator gave to his wife an annuity, or yearly allowance, of "fifteen hundred dollars, United States *currency*, the United States currency to be calculated at the rate of one hundred and ten dollars currency for every one hundred dollars United States gold, if at the time when the above payments commence specie payments should have been resumed and also if gold should have gone higher."

It was admitted that specie payments were resumed before the said annuity became payable. The executor had paid the widow \$1,610 a year, and to this amount objection was made on behalf of the infants, their special guardian claiming that the amount should have been only \$1,500.

S. M. PARBONS, *for executor.*

GEO. G. DUTCHER, *special guardian for infants.*

THE SURROGATE.—The will was made in April, 1875. If specie payments were not resumed, or if gold did not rise in value, as measured by the standard of United States currency, the widow would be entitled to \$1,500 a year in currency, neither more nor less; but the testator had seen the wild fluctuations to which our currency had been subjected; he understood that its purchasing power was less or greater, in proportion as the premium on gold rose or fell. He knew that \$1,500 in currency, with gold at 120, was only equal to \$1,375 in currency, with gold at 110; and, on the other hand, that \$1,500 in currency, at par with gold, was equal to \$1,650 in currency, with gold at 110.

He intended that, if the premium on gold should rise

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above ten per cent., his wife should still receive the same annuity, measured by the standard of gold, as if it had remained at 110, and that, if specie payments should be resumed, when currency would necessarily be exchangeable for gold at par by the government, the amount of her annuity, measured by the same standard, should not be any greater than when gold was at 110, whether paid to her in currency or in gold. He, therefore, provided that his widow should be paid an annuity amounting to \$1,500 in currency, to be calculated at the rate of \$110 in currency for each \$100 in gold, or, in other words, that the amount of said annuity in currency should remain equivalent to \$1,363.64 in gold, whether the premium on gold should rise above 110, or disappear altogether. When, therefore, specie payments were resumed, and the annuity was paid to the widow in currency at par with gold, all she was entitled to receive was the sum of \$1,363.64. The difference, between that amount and the sum paid to her by the executor, must be charged back to him with interest, and he may retain that amount from the annuity to be paid to the widow.

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
January, 1882.

SHIELDS v. INGRAM.

In the matter of the probate of the will, and a codicil thereto, of GEORGE W. SHIELDS, deceased.

The testator and his wife, after the former had made a will, giving all his property to the latter, for life, remainder to his next of kin, adopted a

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little girl of tender years, and brought her up as their daughter. By a codicil to his will, testator substituted the adopted child as legatee, etc., in place of his collateral relatives, and died, leaving no widow or descendants. Probate of the codicil was contested, on the ground of undue influence exercised by testator's wife; the evidence in support of which were statements made by her during her life-time, and, in particular, various significant remarks addressed by her to testator; to compel him to sign a paper, to which he at first demurred, but at length suddenly consented, announcing himself ready to do "anything for peace's sake." The evidence, however, did not render it certain that the paper in question was the codicil; nor did the latter alter the will for the wife's benefit.

Held, that a failure to provide for the daughter would more readily have given rise to a suspicion of undue influence, than the execution of the disputed codicil; and that, upon the evidence, the latter must be admitted.

The testimony of a witness, who assumes to recollect the exact day of a conversation had eighteen years previously, without giving any reason for her accurate memory, is to be received with caution.

APPLICATION for the probate of a will and codicil, by Anna A. Ingram, a legatee under the latter. Probate of the codicil was contested by John Shields, a brother of decedent, and others.

The facts appear sufficiently in the opinion.

WM. H. COURSEN, *for proponent*.

M. S. SMITH and D. C. HARRIMANN, *for contestants*.

THE SURROGATE.—There is no doubt, on the evidence, that the testator was possessed of sufficient testamentary capacity, when the codicil in dispute was made, and that the same was well executed; the only question is whether it was obtained through the undue influence of Mary A. Shields, the wife of the testator.

There is nothing in the codicil itself to warrant such a charge; the change effected by it in the will did not in any way benefit Mrs. Shields; it provided for the welfare of a little girl who had been adopted by Mr. and Mrs.

Shields since the execution of Mr. Shields' will, and who had as much claim upon him as upon his wife. The will substantially gave all the testator's property to his wife, during her life, and what should be left at her death to his heirs and next of kin. The codicil substituted the adopted daughter and her issue, for the testator's heirs and next of kin ; but it provided that, if she should die before Mrs. Shields and without issue, the property should go to the testator's heirs and next of kin.

To have brought up and treated that child, from the time she was fourteen months old, in all respects as if she had been his own daughter, to have provided her for years with the comforts and luxuries which a competent fortune will command, and not to have altered that will, which made no provision for her at all, would have been an act of gross injustice,—an unnatural and heartless act,—which would much more readily have given rise to the suspicion of undue influence than the execution of a codicil carrying out the testator's intention, evinced through life, of treating his adopted daughter as if she had been his own child. It is almost impossible to believe that Mr. Shields did not intend to make any provision in his will for her, and that he would not have done so but for the undue influence of his wife ; and such a conclusion should not be reached without clear and satisfactory proof to sustain it.

Excepting Mrs. Brinkerhoff's testimony, which will be considered hereafter, there is no evidence that the change in the will was in opposition to Shields' wishes, or that it was brought about by the influence of his wife. The only evidence, having a tendency to prove either of those facts, consists of certain remarks made by Mrs.

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Shields and testified to by John Shields, to the effect that she had often told him that none of her husband's folks would get his money, and that she told him the same thing in the spring of 1863, in the presence of her husband, who said to her : "Mary, don't say that." Mrs. Brinkerhoff testified that she was at her uncle's house in Tarrytown, on June 20, 1863 ; that she saw Mr. Dows and another gentleman come through the gate ; that, about ten or fifteen minutes later, Mrs. Shields came up stairs, into the room where she was with her uncle, and said to him : "I want you to come down stairs and sign a paper ;" he said he did not want to go ; she told him that he must ; he asked her what the paper was about ; she explained it to him ; but he could not understand her, neither could witness, and he said in a laughing way : "Now tell me, Mary, is it a cow or a dog, you are talking about ;" she answered him : "You nasty, dirty old fool, you know it is not a cow or a dog, I am talking about ;" then she commenced with most abusive and vulgar language to him, and he said : "I will do it—I will do it ;" she then said to him : "You good-for-nothing old fool, you know it is only to protect me ;" he said : "You are already protected ; what more do you want ?" she said : "If you die, John Shields and Sally Southard would rob me ;" when he said he would go, he repeated twice : "Anything for peace sake ; anything for peace sake ;" she continued her abuse for some time, until he was glad to go, because it was too foul and abusive to listen to.

There are several statements in this testimony, which make it doubtful whether the conversation between Mr. and Mrs. Shields, referred to, related to the codicil in dispute. It will be remembered that the word codicil, or

will, was not mentioned by either Mr. Shields or his wife, and the witness did not know what the nature of the paper was, that Mrs. Shields wanted her husband to sign. It would seem as if Mrs. Shields wanted her husband to sign some paper which related to her, and which was necessary to her protection ; if so, it clearly was not the codicil, as it does not refer to her ; the witness does not say it was the codicil ;—that is only an inference drawn from the fact that the witness fixes June 20, 1863, as the date of the occurrence testified to, and that the codicil was executed on that day. If the witness was mistaken on this point, then clearly the paper referred to was not the codicil ; but how can the witness be certain, now, after the lapse of eighteen years, that the date was the twentieth day of June ? She gives a reason for remembering, that she went to Tarrytown on June 11th or 12th, because she went immediately after burying her little girl, the date of whose death would naturally be impressed on her mind ; but she gives no reason whatever for being able to fix, with certainty, the date of the conversations between Mr. and Mrs. Shields, to which she has testified ; she states no fact which would be likely to fix the date in her mind so that, now, after the lapse of eighteen years, she could speak on the subject without doubt or hesitation ; and, considering the difficulty of doing so, and that the remarks exchanged between Mr. and Mrs. Shields do not seem to apply to the codicil, it would not be safe to set it aside on this testimony.

There is another view to be taken of the matter, upon the assumption that the paper referred to was the codicil, and that is that Mr. Shields objected to signing the paper, because he did not understand it to be a codicil to

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his will, but supposed it to be some other paper, to be used for the protection of Mrs. Shields, when in fact she did not require to be protected, but that he signed willingly on discovering his mistake.

However that may be, it is sufficient to say that, under all the circumstances of this case, the evidence is insufficient to establish the fact that the codicil was obtained through undue influence. It should be admitted to probate.

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
January, 1882.

SCHUMAKER v. QUARITIUS.

In the matter of the judicial settlement of the account of CHRISTIAN QUARITIUS, executor, etc., of HENRY SCHUMAKER, deceased,

Where the indorser of a promissory note appoints the holder his executor, and dies before its maturity, his estate is discharged from liability by the failure of the executor duly to present the note to the maker for payment.

APPLICATION by executor for the judicial settlement of his account. John and Henry Schumaker, infant sons of testator, appeared by guardian.

On the settlement, the executor sought to prove his claim against the estate on certain promissory notes held and owned by him, which were made by the testator's son-in-law, and indorsed by the testator. The testator

made his will appointing the holder of the notes his executor, and died before either of them became due. The executor neglected to present the notes for payment, to the maker, when they respectively became due.

D. B. AMES, *for executor.*

F. L. BACKUS, *special guardian for infants.*

THE SURROGATE.—As against the maker of a note, it is not necessary to present the note for payment when it becomes due, in order to hold him on it; it is his business to be ready to pay it at any time afterwards; but it is different with regard to the indorser.

In general terms, the contract of the indorser is that he will pay the note, *provided* it is not paid by the maker when duly presented for payment at maturity, and due and reasonable notice of such non-payment shall have been given to the indorser (*Story on Notes*, § 135). Due presentment of the note to the maker for payment at maturity is, therefore, a condition *precedent* to the liability of the indorser (*Cayuga Co. Bank v. Warden*, 1 N. Y., 413, 417); and the insolvency of the maker will not dispense with its performance (*Story on Notes*, §§ 203, 252; *Jackson v. Richards*, 2 Caines, 343; *Mechanics' Bank v. Griswold*, 7 Wend., 165, 169).

To this general rule there are exceptions, which it is not necessary to notice here, as they have no application to this case. The notes in question, not having been presented for payment to the maker when they respectively matured, the executor has no claim on them against the estate of his testator.

Ordered accordingly.

SUTTON v. WEEKS.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
January, 1882.

SUTTON v. WEEKS.

In the matter of the estate of JOSHUA WEEKS, deceased.

Although Code Civ. Pro., §§ 2645, 2667, literally require an administrator with the will annexed, to give a bond in a penalty "not less than twice the value of the personal property of which the decedent died possessed," etc., yet, where he is also an administrator *de bonis non*, those provisions are to be construed as fixing the minimum penalty of his bond at the value of the property left unadministered.

Each of the sureties in the official bond of an administrator, etc., must be worth at least the penalty of the bond over all debts, liabilities and property exempt from execution.

Where such a surety has become insufficient, since qualification, the Surrogate's court may require a new or additional surety.

Where no assets had come to the hands of an administrator with the will annexed, but it appeared that he had commenced an action in the supreme court, for claims due to the estate, and that the penalty of his bond was sufficiently great to secure the probable recovery therein,—on an application by a party to the action to compel additional security, *Held*, that the powers of the supreme court were ample to protect all parties in case of the recovery of a greater amount, and that the administrator might, if necessary, be required to give increased security before receiving the money.

APPLICATION by Louisa M. Sutton, a granddaughter of decedent, and a legatee under his will, to compel administrator, with the will annexed, of the goods, etc., of decedent remaining unadministered, to give additional security.

John J. Merritt, the executor, etc., of decedent, having died, James Weeks and George Merritt were appointed administrators with the will annexed.

Further facts sufficiently appear in the opinion.

JOHN R. KUHN, *for petitioner.*

WM. D. VEEDER, *for administrator.*

THE SURROGATE.—The statute requires that the administrator with the will annexed shall give security, and it makes the provisions with respect to the bond to be given by an administrator applicable to such security (Code, § 2645). An administrator is required to give a bond in at least double the amount of the personal property of which the decedent died possessed (Code, § 2667). But it is not supposed that it was the intention of the legislature to exact, from an administrator with the will annexed, a bond for more than double the value of the property left unadministered. In requiring an administrator with the will annexed to give a bond, the object was to exact from him security for whatever property might come into his hands, and that is accomplished by taking a bond in double the value of the property left unadministered. It could not have been the intention of the legislature to compel an administrator with the will annexed to give security for property which had been administered by his predecessor, and never could come into his possession, and no such construction of section 2645 would be warranted. The provisions of section 2667, in respect to the bond to be given by an administrator, must be applied to the bond required from an administrator with the will annexed, in conformity with and not contrary to the manifest intention of the legislature, and this construction requires only that an administrator with the will annexed, like an administrator, shall give a bond in double the value of whatever property may come into his possession to be administered.

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In the principal case, no assets have come to the hands of the administrator with the will annexed. And Hannah B. Merritt, who is the residuary legatee and executrix of John J. Merritt, the executor of Joshua Weeks, deceased, claims that nine of the twenty-one shares of the residuary estate, disposed of by the will of Joshua Weeks, were paid by the said executor of Joshua Weeks, and distributed to the parties entitled thereto, who executed to said executor assignments and releases of their respective interests in said estate, and that she has, since the death of said executor, settled with the owners of five other shares of said residuary estate, and taken assignments of their shares, making in all fourteen of the residuary legatees who, she claims, have been paid and settled with, and who have assigned their respective shares of the estate, either to John J. Merritt or to herself.

I do not understand the petitioner to deny that these assignments were made. Her counsel, in stating his views of the facts in his brief, says: "Some of the twenty-one legatees wanted their portions, and were paid; but, instead of taking releases from them, and properly reducing the number of claimants for the balance of the estate, it is intimated that he (the executor) took assignments of their shares to himself or his wife, although the payments were made out of the trust-funds and so charged. These assignments are disputed, and will be contested on final accounting, or whenever the matter is brought up for settlement."

It appears, also, that the administrator with the will annexed has commenced an action in the supreme court, against Hannah B. Merritt individually, and as executrix, etc., of John J. Merritt (to which action the petitioner is

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a party) for the purpose of having the executrix of John J. Merritt account, and pay over, to the administrator with the will annexed of the estate of Joshua Weeks, such amount as may be found due to him.

Mr. Wormwell, the book-keeper who prepared Mrs. Merritt's accounts in the action in the supreme court, testified that, assuming the settlements and assignments, above referred to, to be valid, the amount due from Mrs. Merritt to the estate of Joshua Weeks is less than \$5,000. There was no evidence, offered before me, to show that the parties who made these settlements and executed these assignments now repudiate them; and if they do, the question must be settled in the action in the supreme court; until then, this court would not be justified, on this application, in assuming that they are void (*Downing v. Smith*, 4 *Redf.*, 310; *Wright v. Fleming*, 12 *Hun*, 469, 471; 76 *N. Y.*, 517). As the case now stands, the penalty of the bond, given by the administrator with the will annexed, is sufficiently large. If he should recover judgment, in the action now pending in the supreme court, for more than \$5,000, he can then be required to give increased security, before being permitted to receive the money, and the powers of that court are ample to protect the interests of all parties interested.

But while the amount of the penalty of the bond is large enough, the surety Brown, is insufficient. The bond is in the penalty of \$10,000, and each of the two sureties must be worth at least the penalty of the bond, over and above all debts and liabilities and property exempt from execution. When the bond was executed, Brown could and did justify in more than the amount of its penalty; but he has since met with reverses,

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and is not now worth over \$8,000, and that is not enough. He must own property, exempt from execution, of the value of at least \$10,000, over and above the amount of his debts and liabilities. The administrator with the will annexed must give a new or an additional surety.

Ordered accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
February, 1882.

INGREM v. MACKEY.

*In the matter of the judicial settlement of the account
of WILLIAM MACKEY, executor, etc., of JAMES IN-
GREM, deceased.*

The testator, by his will, gave all his personal, and part of his real property to his wife, and directed the executor, as soon as practicable, and in his reasonable judgment proper, after the death, but within a year, at most, to sell the residue of the real property, and dispose of the proceeds of sale among legatees named. The executor collected rents, and sold the real property, but not until after the year, and, on his accounting, claimed that he was not bound to include the rents so collected, being answerable therefor to the heirs and not to the legatees.
Held,

1. That the power of sale, given to the executor, was an imperative power in trust, which, notwithstanding the discretion given, effected an equitable conversion of the real into personal property, from the testator's death.
2. That the rents, as well as the proceeds of sale, became assets in his hands, and he was accountable therefor, in his capacity as executor, to the legatees, in the Surrogate's court.

Exceptions to a referee's report, on an accounting, to answer any useful purpose, must specifically point out the errors complained of, where the latter do not appear from a mere denial of the correctness of the finding.

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MOTION to confirm referee's report, on the judicial settlement of executor's account, had at the instance of Salome Ingrem, a legatee under the will.

The facts appear sufficiently in the opinion.

D. P. BARNARD, *for executor.*

CHAR. A. JACKSON, *for Salome Ingrem, petitioner.*

THE SURROGATE.—The principal question, to be decided on this motion, is whether the executor should account for the rents of the real estate collected by him.

The will gave all the personal property to the widow, and also part of the real estate; it then directed the executors, as soon after the decease of the testator as practicable, and as should be proper in their reasonable judgment, and which time should be, at most, within a year after the death of the testator, to sell and dispose of all the rest, residue and remainder of the real estate, for the best prices they could obtain, and to dispose of the proceeds of sale among certain legatees therein named.

The executor took charge of the real estate ordered to be sold, soon after letters testamentary were issued to him, and collected the rents thereof. He sold the real estate; but, as he had allowed the year to expire, during which he was to exercise the power of sale under the will, the purchaser refused to take the title until the defect had been cured by certain proceedings had in the supreme court, when the sale was completed. The executor entered the rents collected by him, in his account as executor; but subsequently filed with the auditor a protest against being charged with them, claiming that, as

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executor, he had no right to collect them, and was accountable for them to the heirs, some of whom were not legatees under the will. The auditor took this view of the law, and stated the account, leaving out the rents collected, and the payments made for repairs to the real estate.

The power of sale to the executor was an imperative power in trust, and it had the effect of working an equitable conversion, of the real estate to be sold, into personal property, upon the death of the testator, notwithstanding the discretion given to the executor to exercise the power at any time within a year afterwards; it stamped the quality of personalty upon the real estate, and subjected it to the laws governing personal property (*Betts v. Betts*, 4 *Abb. N. C.*, 317, 386, 387, 417; *Leigh & Dalzell on Eq. Conv.*, 48; *Smith v. Kearney*, 2 *Barb. Ch.*, 533, 538; *Arnold v. Gilbert*, 5 *Barb.*, 190, 197; *Stagg v. Jackson*, 2 *Barb. Ch.*, 86; *affi'd* 1 *N. Y.*, 206; *Horton v. McCoy*, 47 *Id.*, 21; *Moncrief v. Ross*, 50 *Id.*, 431; *Ross v. Roberts*, 2 *Hun*, 90; *Graham v. Livingston*, 7 *Id.*, 11).

It is not denied that the proceeds of the sale of the real estate are assets in the hands of the executor, to be accounted for in this court, but it is claimed, on behalf of the executor, that such is not the case with regard to the rents arising from said real estate, and that they belong to the testator's heirs at law.

When it is considered that equitable conversion is "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such" (*Leigh & Dalzell on Eq. Conv.*, 2), it is

difficult to understand that the profits should not be affected by the change in the nature of the property from which they arise; and the authorities show that, unless the will otherwise provides, the rents arising from real estate, after the time when it was ordered to be sold and converted into personal property, are to be considered and treated as the profits from the fund into which the real estate was ordered to be converted.

Thus, in *Leigh & Dalzell, supra*, at page 48, it is said: "When land is once impressed by will with the character of personalty, the person entitled to the interest of the fund arising from the produce will likewise be entitled, until sale, to the rents and profits, which will not therefore go to the heir;" and *Casamajor v. Strode* (in note to 19 *Vesey*, 390) is cited as holding that, where the testator devised real estate to trustees, upon trust to sell and dispose of the same, as soon as conveniently after his death, by public or private sale, and to stand possessed of the proceeds on certain trusts for several persons respectively for life, and after their respective deceases for their children, the devisees for life named in the will were entitled to the rents and profits of the real estate thereby devised, from the death of the testator.

In *Stagg v. Jackson* (2 *Barb. Ch.*, 86), the testator, by his will, had devised and bequeathed all his estate, real and personal, to his executors, in trust to sell the same, and until such sale to receive the rents, profits and income thereof, for the purpose of division and distribution among the objects of his bounty. The executor received the rents and profits of the real estate, until he sold the land, and then received the proceeds of such sale. On

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being called to account before the Surrogate, the executor tendered an account of the personal property *only*, and denied the jurisdiction of the Surrogate to call him to an account for the rents and profits, or the proceeds of the sales of the real estate; the Surrogate ordered the executor to account for the rents and profits, as well as for the proceeds of the sales of the real estate. The executor appealed, and the Surrogate's order was affirmed by the chancellor, and sustained by the court of appeals, on appeal from the chancellor's decree (1 *N. Y.*, 206).

In *Moncrief v. Ross* (50 *N. Y.*, 431), the will gave the net income of the real estate to the mother of deceased, during her life. The seventh clause directed the executor, upon her death, to sell the real estate; and the eighth and ninth clauses gave the proceeds of sale to the testator's two sisters. The mother of the testator died before him, and the only heirs of the deceased were his two sisters and a brother. The action was brought by the brother to compel the executor to account for the rents of the estate collected by him, and to pay to him one-third thereof. The court say: "Any income derived from the real estate before the sale has been made, in equity clearly belongs to these sisters, and not to the plaintiff. This was the intention of the testator, apparent from the will."

In *Shumway v. Harmon* (6 *S. C. [T. & C.]*, 626), the testator directed that his son should work the testator's farm in Phelps, as he was then doing, on shares, for the term of one and a half years after testator's decease, and that, at the expiration of that time, his said farm and personal property should be sold by his executors, and

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the amount received upon said sale divided among his children in the manner specified.

The court say: "At the time the power of sale thus became operative, the conversion took place in law, and took with it all the incidents of the said property, all rents and profits, as part of the trust fund to be distributed;" citing *Moncrief v. Ross*, and *Stagg v. Jackson*, *supra* (see also *Redf. Prac.* [2 ed.], 440).

It follows, from these authorities, that the rents collected by the executor in the principal case became assets in his hands, as well as the proceeds of the sale of the real estate, and that he must account for them.

The second and third exceptions are overruled. If they were intended as objections to any item of disbursement allowed by the auditor, they should have been specific enough to call the court's attention to the objectionable item. Excepting to the auditor's report is not a mere matter of form (*Boughton v. Flint*, 74 *N. Y.*, on p. 485); and, if the exceptions are to answer any useful purpose, it is clear that they ought to be at least specific enough to point out the error complained of, where it does not appear, from a mere denial of the correctness of the auditor's finding (*Newell v. Doty*, 33 *N. Y.*, 83; *Levy's Accounting*, 1 *Abb. N. C.*, 177; *Estate of Skillen*, MS. in this court).

Ordered accordingly.

BLACK v. WOODMAN.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
February, 1882.

BLACK v. WOODMAN.

In the matter of the estate of MOSES THOMPSON, deceased.

Administration granted by a Surrogate's court of this State, upon the goods, etc., of a resident of another State, is subsidiary to that granted in decedent's domicil, and relates only to assets here.

Accordingly, where an administrator, appointed in Massachusetts, of the estate of one dying domiciled there, afterwards received letters in this State, which were revoked, and his successor, appointed here, applied for an accounting, alleging that, at the time of his removal, the former had property of the estate in his possession; the respondent denying that he had received any property under the letters revoked:—

Held, that the respondent could not be made to account, in a Surrogate's court of this State, for assets collected under letters granted in Massachusetts and brought hither, but that he might be required to submit to an examination as to the assets liable to be administered under the letters granted here.

APPLICATION to compel an administrator to render, and procure the judicial settlement of, his account.

The facts appear sufficiently in the opinion.

CHARLES N. BLACK, *in person*.

PEABODY, BAKER & PEABODY, *for Aaron Woodman*.

THE SURROGATE.—The deceased, at the time of his death, was a resident of Massachusetts, and Aaron Woodman was appointed administrator of his goods and effects at the place of his domicil. Subsequently, in December, 1867, Woodman was also appointed administrator by this court, on proof that the deceased died leaving assets in this county. In August, 1869, the letters granted to

him by this court were revoked, and Charles N. Black was appointed administrator in his place.

The present application is made by Black to compel Woodman to render and settle his account as administrator.

It is alleged, in Black's petition, that Woodman had in his possession personal property belonging to the deceased, at the time his letters were revoked. Woodman files a verified statement purporting to be an account of his proceedings as administrator, in which he states that, during the time he remained administrator under the letters granted by this court, he did not receive any money or property belonging to the estate in the State of New York, or under the letters granted in the State of New York, and did not receive any at all, during that time, outside of the State of Massachusetts; but he does not deny that he had in his possession, at the time his letters were revoked, assets belonging to the estate of the deceased, which were collected under the letters granted in Massachusetts.

The administration granted at the place of the decedent's domicile was the principal one, and the administration granted here was subsidiary to it; it related exclusively to the assets within this State, and the jurisdiction of this court is limited to them; it does not extend to the assets, collected under the letters granted in Massachusetts, and brought into this State (*Redf. Prac.* [2 ed.], 641, 642; *Lynes v. Coley*, 1 *Redf.*, 405). It is upon this want of jurisdiction in any other court, to act in such a case, that the right of a court of equity to apply the remedy is founded (*McNamara v. Dwyer*, 7 *Paige*, 239; *Brown v. Brown*, 1 *Barb. Ch.*, 189).

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Woodman cannot, therefore, be made to account in this court, for the assets collected under the letters granted in Massachusetts and brought into this State; but he may be required to submit to an examination respecting the assets of the deceased in this State liable to be administered under the letters granted here, if the petitioner so desires.

Ordered accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
February, 1882.

WISE v. MURPHY.

In the matter of the estate of GEORGE S. WILEY, deceased.

The testator, by his will, gave the income of \$2,000 to A. and B. for their lives and that of the survivor, and the principal thereafter to petitioner, directing the executrix and executor to invest the fund. He also gave a legacy of \$10,000 to G. The executrix, also the residuary legatee, having alone qualified, omitted to invest the \$2,000, but, on the death of B., paid said principal sum to A., and died. A. died insolvent. The executor, having qualified generally as executor, received \$10,000, assets of the estate, and paid G.'s legacy, but made no attempt to collect the \$2,000 misapplied by the executrix, from her estate, which was solvent.

Held, that, the legacy of \$2,000 never having been separated from the general fund in the hands of the executrix, and the executor having qualified generally, he could not claim that he was not clothed with any of the *trusts* under the will; that, though not responsible for the misapplication of the fund by the executrix, he should have collected the amount from her estate; and was liable to the petitioner for the amount of his legacy, with interest from the death of A.

WISE v. MURPHY.

APPLICATION by George W. Wise, a legatee under the will of decedent, to compel payment of his legacy.

The facts appear sufficiently in the opinion.

GRIMBALL & TUNSTALL, *for petitioner.*

WINCHESTER BRITTON and GEORGE J. MURPHY, *for executor.*

THE SURROGATE.—The testator, by his will, gave to George D. Wise and to his wife, and the survivor of them, the interest and income of \$2,000, during their joint lives and the life of the survivor of them, and gave the said principal sum of \$2,000 to their son, George Wiley Wise, the petitioner, to be paid to him on the death of his surviving parent; and the testator further directed the executrix and executor of his will to keep the said principal sum invested on bond and mortgage, or in government or bank stock, or such other securities as they should deem prudent and advisable.

He appointed his residuary legatee, Ann Forbes, the executrix, and his friend, Henry C. Murphy, executor of his will. The executrix, at first, alone qualified, and, until her death, had the sole care and management of the estate. Instead of keeping the sum of \$2,000 invested, and paying to George Wise, who survived his wife, only the income thereof, she paid over to him the whole of the said principal sum.

At the time of the death of the executrix, in 1863, there remained unpaid a legacy of \$10,000, given by the testator to his half-sister, Mrs. Garrett, of Virginia; and Mr. Murphy qualified and took out letters testamentary in the usual form, in June, 1863. The only assets of the estate which came to his hands was the said legacy of \$10,000, received by him from the executrix of Miss

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Forbes, and of which he took charge until he paid it, in 1865, to the administrator of Mrs. Garrett. He also, in 1865, executed an assignment to the executrix of Miss Forbes of a bond and mortgage, made by one Denyse to the testator, but which never were in the possession of Mr. Murphy. Miss Forbes seems to have taken possession of them to her own use, as the sole residuary legatee of the testator, and the assignment executed by Mr. Murphy to her executrix was apparently for the only purpose of assigning the record title. George Wise, the father of the petitioner, survived his wife, and died insolvent.

When Mr. Murphy qualified as executor, and found no assets belonging to the estate, excepting the legacy given to Mrs. Garrett, he must have known, of course, that the legacy of \$2,000, payable to the petitioner on the death of the survivor of his parents, had been misapplied by the executrix in some way, and, although he was not responsible for the misapplication of the fund by the executrix, it then became his duty to collect from her estate, which was solvent, the amount which should have come to him as assets of the estate of the testator, to be held in trust for the petitioner (*Hill on Trustees*, [314]; 3 *Redf. on Wills*, 532; *Weetjen v. Vibbard*, 5 *Hun*, 265, 267; *Olcott v. Ormiston*, 84 *N. Y.*, 339, 344, 345).

But it is claimed, on behalf of Mr. Murphy, that he took upon himself the duties, and subjected himself to the responsibilities of an executor and trustee only as to Mrs. Garrett's legacy of \$10,000. There is nothing in the evidence to support this claim, and it is inconsistent

with the fact that he assigned the Denyse mortgage as executor.

The will, from which he derived his authority as executor, appointed him generally, and not for any limited purpose; the oath, taken by him on qualifying, was not restricted to the proper administration of any particular part of the estate; and the letters testamentary issued to him, following the authority conferred by the will, were general, and granted to him "the administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning his will."

All that can be said is that it appears, from the oral evidence, that, the executrix of Miss Forbes having been advised that she could not safely pay the \$10,000 legacy directly to the legatee to whom it was given, Mr. Murphy qualified as executor, supposing that the estate had been fully administered, excepting as to this legacy.

Assuming that the \$2,000 legacy eventually to be paid to the petitioner, when separated from the other assets of the estate, was to become a trust fund, to be held by the executors as trustees, and not as executors (*Hall v. Hall*, 78 *N. Y.*, 535), and that Mr. Murphy could have accepted the office of executor, while refusing that of trustee (*Williams v. Cushing*, 34 *Maine*, 370), the separation of the legacy from the general fund in the hands of the executrix had never been made, so as to leave the legacy a separate trust fund in the hands of the trustee at the time of her death; it should therefore have come to the hands of Mr. Murphy as executor, as part of the general funds of the estate. Moreover, there was no refusal on his part to accept the trust while qualifying as executor, and he cannot now be allowed to say that

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he was not clothed with any of the trusts which under the will devolved on the executors (*Wms. on Ex'rs.* [1796]; 3 *Redf. on Wills*, 612). He must, therefore, be charged with the amount of the legacy given by the testator to the petitioner, with interest thereon from the date of the death of George D. Wise, and a decree must be entered, directing him to pay the said amount to the petitioner.

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
March, 1882.

MATTER OF BURKE.

*In the matter of the probate of the will of JAMES
BURKE, deceased.*

One named as legatee in a will, *on condition* that he render certain services of a religious character, is, under Code Civ. Pro., § 829, disqualified by his interest in the event, from testifying to conversations had between him and the testator.

The court has a discretion to strike out, on motion made during a hearing, testimony incompetent under that section, though not objected to when offered.

Pruyn v. Brinkerhoff, 7 *Abb. N. S.*, 400,—distinguished.

MOTION by contestant, to strike out testimony given on proceedings for probate of a will, by a legatee, as to conversations between him and testator.

The facts appear sufficiently in the opinion.

TEUNIS G. BERGEN, *for the motion.*

JOHNSON & LAMB, *opposed.*

MATTER OF BURKE.

THE SURROGATE.—The testimony of Father Mulligan would have been inadmissible, if objected to, under section 829 of the Code. He is a legatee under the testator's will, and the argument that he is not interested in the event of these proceedings because the legacy was given to him on condition that he should render certain services of a religious character, is not sound. That argument is founded on the decision in the case of *Pruyn v. Brinkerhoff* (7 *Abb. N. S.*, 400), which holds that a legacy to an executor as compensation for his services, in addition to the commissions, is not such beneficial legacy as must be held to be void, under 2 *R. S.*, 65, § 50, if the executor becomes a necessary witness to the execution of the will. This decision might be upheld upon the ground that sections 398 and 399 of the former Code so far modified and controlled the statute as to render the executor competent (*Children's Aid Society v. Loveridge*, 70 *N. Y.*, 392); but, whatever may be the correct ground on which to put the decision, it is sufficient to say here that it has no application to section 829 of the Code, and that it has been repeatedly held that the interest which disqualified a person from testifying under that section may be a claim to receive a fair compensation for services rendered or work done. The cases of *Reeve v. Crosby* (3 *Redf.*, 74); *Children's Aid Society v. Loveridge* (*supra*); and *Rugg v. Rugg* (83 *N. Y.*, 592), only hold that the execution of a will, to which one executor is an attesting witness, is not a transaction between him and the deceased within section 829 of the Code, and that he may therefore testify to it. These decisions were not and could not have been put upon the ground that the executor was not interested in the event of the proceeding.

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to prove the will, because, at the time when they were rendered, the executor propounding the will for probate was excluded as a *party* to the proceeding, without regard to the question of his interest under the will. The amendment to the section which seems to require that the *party* to the proceeding must be interested in the event, as well as a person not a party, before he can be excluded, was only adopted in 1881.

The fact that the testimony was not objected to under section 829, when given, does not prevent the contestant from moving now to strike it out. In *Miller v. Montgomery* (78 N. Y., 286), the court of appeals say: "Usually the objection must be made when the incompetent evidence is offered; and this is the rule as to all incompetent evidence. But if the objection be not made at the time, and the omission be shown to have been from mistake or inadvertence, the trial court may permit it to be made at any time before the close of the trial, by motion to strike out the incompetent evidence. This is not uncommon practice in the trial of cases. When the objection is not made at the time the evidence is offered or given, it is in the discretion of the trial judge to permit it to be made, at a later stage of the trial. That discretion should be carefully exercised, so that no harm will come to the other party; and it should be exercised when it is just that the incompetent evidence should be excluded and no harm can come to the opposite party from the delay in making the objection."

It is not perceived how the executor in this case can be injured by the delay in making the objection; the trial is not closed, and by striking out the objectionable testimony he will be left in the same position as if the

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testimony had been objected to and excluded when first offered. The motion must be granted.

Ordered accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
March, 1882.

McNALLY v. BROWN.

*In the matter of the application for probate of a will of
ROBERT F. BROWN, deceased.*

Upon an application for the probate of a will, as lost or destroyed,—it appearing to have been in existence at the time of decedent's death,—the loss or destruction is a fact material to be proved.

Upon an application for the probate of a lost or destroyed will, it is not necessary,—under Code Civ. Pro., §§ 1865, 2621, requiring its provisions to be “clearly and distinctly proved by at least two credible witnesses,”—that the witnesses should remember the exact language; but they must be able to testify at least to the substance of the whole will, so that it can be incorporated in the decree if probate is granted.

Accordingly, where probate was asked, of a will in existence at the time of decedent's death, and last seen in the possession of the principal beneficiary, the petitioner, but there was no evidence that it had been lost or destroyed; and the testimony of petitioner, the draftsman, the subscribing witnesses, and another, as to its provisions, was such as only to enable the court to surmise the nature thereof, and no two witnesses proved all the provisions,—

Held, that there was not a compliance with the statute, and that probate must be refused.

APPLICATION by Robert Brown, a son of decedent, for the probate of a will claimed to have been lost or destroyed since the latter's death; opposed by Emma McNally, a daughter of decedent, and another.

M'NALLY v. BROWN.

The facts appear sufficiently in the opinion.

JOHN Z. LOTT, *for petitioner.*

E. J. DOOLEY, *for contestants.*

THE SURROGATE.—Under the Code, this court has authority to admit to probate a lost or destroyed will which was in existence at the time of the testator's death, or was fraudulently destroyed in his life-time; but it is indispensable that the provisions of such will should be *clearly* and *distinctly* proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness (Code, §§ 2621, 1865).

It appears that the will was in existence at the time of the death of the testator; but there is no evidence that it has been lost or destroyed, which is a material fact to be proved, particularly when it was last seen in the possession of the person in whose favor it is claimed to have been made.

Neither were the provisions of the will *clearly* and *distinctly* proved by two witnesses.

The witness Brown, the son of the testator, testified that the property in Canton street was left to his mother during her life, and that, after her death, it was to go to him; that the property in Grand avenue, and the personal property, were left to him solely; that the Canton street property was to come to him in the event of his mother's marriage; that his sister's name was not mentioned; that he forgot a good deal that was in the will, and had a very poor memory.

Thomas W. Dawson testified that he was one of the witnesses to the will; that he heard the will read at the

time it was executed, but could not remember all of it,—it was so long ago ; that he remembered that the Canton street property was left to the testator's wife and the Grand street property to his son absolutely,—he to have possession of it when he came of age, his mother to have the benefit of it until he came of age.

Thomas J. Dawson, the other subscribing witness, heard the will read and slightly remembered the contents of it. His recollection was that the property in Canton street was left to Mr. Brown's wife, and the property in Grand avenue to his son Robert.

George Miller did not read the whole of the will, only read some portions of it :

Q. "From your recollection of reading that will, can you state what it said?"

A. "I can't state. I think that Mrs. Brown pointed out to me, in the presence of her daughter, the portion I read, where it said the property should be left to the son and the daughter should get nothing ; then we had a general conversation about it."

Edward F. O'Reilly, the lawyer who drew the will, testified that the testator had two houses in Canton street which were embodied in the will, which he gave to his wife, and there was a house in the Seventh ward,—he thought in Grand avenue,—that was given to his son, and he thought testator mentioned at the same time that he had a daughter ; that he thought that the testator said that he gave his daughter something previous to that, and that would compensate her for not having anything in the will.

Q. "Were there any further provisions in the will than you have mentioned?"

A. "Not to my recollection, except that all his lawful debts should be paid."

It is impossible to find that the provisions of the will have been *clearly* and *distinctly* proved by two witnesses.

It is not necessary that the witnesses should remember the exact language used by the testator; but they must be able to testify at least to the substance of the whole will, so that it can be incorporated in the decree, should the will be admitted to probate.

In the principal case, what were the terms of the devise of the Canton street property to the wife? Was it for life, or until she should marry again, or absolutely? Was she to have the possession of the property in Grand street during the minority of the son? To whom was the personal property bequeathed? The witnesses do not agree on these points. The son of the testator, who had the possession of the will for several years after his father's death, who claims to be the person most interested in having it admitted to probate, and who seems to have read it more recently than the other witnesses, ought to be the person most familiar with its provisions. It is likely, however, that he was not to come into possession of the property devised to him, until he had reached the age of twenty-one, as testified to by Thomas W. Dawson, who is corroborated on this point by what the testator told Miller, in speaking to him of the contents of his will, that he would leave his property to his son, and that his daughter should not get anything, *that is, after his son came of age.*

According to the evidence, the substance of the will, then, probably was that the Canton street property was devised to the widow for life if she did not marry again,

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and, upon her death or marriage, it was to go to the son; that the Grand street property was devised to the son, to take possession of it when he became twenty-one years of age, and his mother to have the benefit and possession of it until then; that the personal property was bequeathed to the son. But no *two* witnesses have proved all these provisions. Probate must therefore be refused (*Sheridan v. Houghton*, 6 Abb. N. C., 234).

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
April, 1882.

EARLY v. EARLY.

*In the matter of the probate of the will of WILLIAM
EARLY, deceased.*

The requirement, in Code Civ. Pro., § 1865, that the provisions of a lost or destroyed will must be "clearly and distinctly proved by at least two credible witnesses," should receive a liberal construction; and its spirit is complied with by holding that it applies only to those provisions which affect the disposition of property, and are of the substance of the will.

The destruction of a will in the life-time of a testator, without his knowledge or consent, in disregard of his intention, and to the injury of a beneficiary, though with no design to gain advantage, or injure or deceive any one, is fraudulent within the meaning of the same section.

Upon an application to prove a will alleged to have been fraudulently destroyed in testator's life-time, the subscribing witnesses agreed that the will was read aloud to, and signed by the testator, in their presence, and that they signed in his presence, but they differed as to whether the declaration of the nature of the instrument, and the request to sign, were made by the testator, one witness swearing positively that they were so made, and the other stating that they were made in testator's presence, by M., who drew the will and supervised the execution.

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Though testator was ill and feeble, it did not appear that he was in such a condition as to be unable to make or dissent from such a request and declaration; the execution was not immediately before his death; and both subscribing witnesses testified that he was of sound mind. Two witnesses agreed that all the property was devised and bequeathed to testator's widow, but differed as to whether an executor was appointed. After the will was executed, the draftsman took it with him to keep for testator, put it among his papers, and died. His son found it among his father's papers and destroyed it, during testator's life-time, as a paper of no importance.—*Held*,

1. That the due and proper execution was shown.
2. That the provisions were sufficiently proved, notwithstanding the doubt as to the appointment of an executor, which was not an indispensable part of the will.
3. That the destruction was fraudulent, as against the beneficiary, within the meaning of the statute.
4. That the petition for probate should be granted.

THIS was an application by Margaret Early, decedent's widow, and sole legatee and devisee, for the probate of a will alleged to have been fraudulently destroyed in decedent's life-time; opposed on behalf of William J. Early, decedent's infant son.

The facts appear sufficiently in the opinion.

THOMAS P. SMITH, *for petitioner*.

JOHN R. TRESSIDDER, *special guardian for infant*.

THE SURROGATE.—This is an application to prove a will alleged to have been fraudulently destroyed during the life of the testator. It is claimed, on behalf of the infant, on evidence offered on the part of the proponent, that the will was not properly executed; that the contents were not proved by two witnesses; and that it was not fraudulently destroyed.

The testimony as to the execution of the will is not satisfactory, yet when closely analyzed it will be found to be sufficient. The will was drawn by a Mr. McCann,

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who supervised its execution, and who was no doubt familiar with the requirements of the statute on that subject, as he was in the habit of drawing wills. The subscribing witness, Lennon, testifies positively that the testator declared, in the presence of himself and the other witness, that the paper referred to was his last will. The other witness, Quail, says the same thing on his direct examination ; but, on his cross-examination, he testifies in substance that he don't think it was Early who made the declaration that the paper was his last will and testament, but that it was Mr. McCann, and that the declaration was made in the presence of Early. Lennon also testified that the testator requested him to sign the will, but Quail says that the request was made of him by McCann in the presence of the testator. The will was read aloud to the testator in the presence of the witnesses, and the testator signed it in the presence of both witnesses, who also signed it in his presence.

The only questions in dispute are as to the declaration of the nature of the instrument by the testator, and as to his request to the witnesses to sign it. There is positive proof that the testator expressly declared the instrument signed by him to be his last will, and the request to the witnesses to sign was made in his presence by the person who was supervising the execution of the will. That was sufficient (*Gilbert v. Knox*, 52 *N. Y.*, 125 ; *Peck v. Cary*, 27 *Id.*, 9).

It is quite true that, if it had appeared that the testator was so ill and feeble, at the time of the execution of his will, as to make it doubtful whether he understood what was going on, or was able to dissent from what Mr. McCann said or did in his behalf, the proof made,

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as to the testator's request to the witnesses to sign, would be insufficient (*Heath v. Cole*, 15 *Hun*, 100). But such is not the case. Although the testator was ill and feeble, and had been so for some time, yet he was not in such a condition as to be unable to declare the nature of the instrument executed by him, and to request the witnesses to sign it. The will was not executed within a short time before his death, and the subscribing witnesses both swear that his mind was sound. It is not to be inferred that he was incapable of making a will, much less of objecting to what McCann said, merely from the fact that he was weak in body and mind (*Horn v. Pullman*, 72 *N. Y.*, 269, 276; *Snyder v. Sherman*, 23 *Hun*, 139, 141).

In *Belding v. Leichardt* (2 *S. C.* [*T. & C.*], 52; 56 *N. Y.*, 680), the testator was very ill and feeble, and it was held sufficient that the witnesses had been requested to sign by a third person, in the presence of the testator.

In *Doe v. Roe* (2 *Barb.*, 200), the testator was also ill when he executed his will, and there was no other request to the witnesses, to subscribe their names as witnesses, than that which was made by the doctor, who was attending the testator, in his presence.

In *Brown v. De Selding* (4 *Sandf.*, 10), the testatrix was ill, and died a few days after the execution of the will; the request to the witness to sign was made by others in her presence, and the court thought that sufficient.

One of the subscribing witnesses, and the person who last had the will in his possession, agree that all the testator's property was devised and bequeathed to his widow; they do not agree, however, as to whether an

executor was appointed. Mr. Quail thinks that Mr. Boyle was appointed executor, while Dr. McCann is satisfied that nothing was said on the subject. If the will did contain a provision appointing Boyle executor, such a provision would no doubt form part of the will (Barber v. Barber, 17 *Hun*, 72), but it would not be an indispensable part of it, and would not in any way affect the disposition which the testator has made of his property for the benefit of his widow. Section 1865 of the Code requires that the provisions of a lost will must be clearly and distinctly proved by at least two credible witnesses, before it can be admitted to probate; but this section must receive a liberal construction (*Hook v. Pratt*, 8 *Hun*, 102, 109); and its spirit is complied with by holding that it applies only to those provisions which affect the disposition of the testator's property, and which are of the substance of the will. The contents of the will were, therefore, sufficiently proved by two witnesses.

The will was destroyed during the lifetime of the testator under the following circumstances. Immediately after it was executed, Mr. McCann took charge of it, and told the testator that he would put it in the bank and keep it for him. After Mr. McCann's death, but before the death of the testator, Mr. McCann's son found the will among his father's papers, and, not considering it of any importance, destroyed it. Section 1865 of the Code provides that the lost will must have been in existence at the time of the testator's death, or *fraudulently* destroyed in his life-time.

In the destruction of this will there was no fraud, in the sense of an intent to profit by it, or to deceive or

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injure any one ; but the will was destroyed without the knowledge or consent of the testator, in disregard of his intention, and to the injury of the person who was made the object of his bounty. That was a *fraudulent* destruction, within the meaning of section 1865 (Schultz v. Schultz, 35 N. Y., 653, 656).

Decreed accordingly.

KINGS COUNTY.—HON. W. L. LIVINGSTON, SURROGATE.—
April, 1882.

WOOD v. CROOKE.

*In the matter of the probate of the will of LEDRA
WOOD, deceased.*

An application, under Code Civ. Pro., § 2606, to compel the representative of a deceased co-representative to account and deliver over property, is not terminated by a verified denial that property has come into the possession or is under the control of such representative. The applicant has a right to examine the respondent under section 2735.

Section 2718 of that Code, providing for a dismissal of the petition by the Surrogate, upon the filing of a verified answer, raising a doubt as to the validity of petitioner's claim, refers exclusively to proceedings taken under § 2717, and has no application to those taken under § 2606.

APPLICATION by Adeline V. R. Wood, sole surviving administratrix, etc., of decedent, to compel Robert L. Crooke, executor of her deceased co-administrator, to account, and deliver over property of decedent.

The facts appear sufficiently in the opinion.

ISAAC S. BRYAN, *for petitioner.*

SUTHERLAND & SCOTT, *for executor of deceased administrator.*

WOOD P. CROOKE.

THE SURROGATE.—This is an application under section 2606 of the Code, which authorizes the Surrogate, upon application of a surviving administrator, etc., to compel the executor or administrator of a deceased administrator, etc., to account for and deliver over any of the trust property which has come to his possession or is under his control.

The sole acting executor of the deceased administrator of the effects of Ledra Wood has filed a verified answer to the petition, alleging that none of the property of the said Ledra Wood has come to his possession or is under his control, and he claims that the petition must be dismissed, on said answer, under section 2718. That section refers to proceedings instituted under section 2717 and has no application whatever to proceedings under section 2606. It is true that the executor of the deceased administrator is only called upon to account for the property of the intestate which has come to his possession or is under his control ; but his denial that any of said property has come into his hands or is under his control is not sufficient to put an end to the proceeding. The petitioner still has a right to examine him under section 2735 and to prove, if she can, that there is property of the intestate which he is bound to account for and to deliver over to her.

Let this matter stand adjourned, generally, under the rule.

Ordered accordingly.

ERIE COUNTY.—HON. ZEBULON FERRIS, SURROGATE.—
June, 1881.

BYRNES v. DIBBLE.

In the matter of the application for letters of administration upon the estate of JOHN W. BYRNES, deceased.

Although no form, rite or ceremony is essential, in this State, to the validity of a marriage, it does not follow that any cohabitation, with whatever motive begun, may, by the false acknowledgment of the marital relation, kept up for a time, grow into a lawful state of matrimony. To raise a presumption of the fact of marriage, from that of cohabitation, the latter must be matrimonial, and not illicit, in its inception.

The petitioner, having applied for letters of administration upon the estate of decedent, a tug-captain, who died suddenly in February, 1881, leaving brothers and sisters his only next of kin,—on the ground that she was his widow, it appeared that she and decedent began to cohabit in the latter part of 1879; that he took her to a respectable boarding-house, introduced her in society as his wife, took out a policy of life insurance in her name as his wife, and wrote her a letter, signing himself her husband. In May, 1880, they having had an affray, she sued him for an assault in her own name, which she stated to be Helen Dibble. This action was settled, but, before its termination, he resumed his relations with her, again introduced her as his wife, and lived with her until his death. It further appeared that petitioner had stated, on one occasion, that decedent had been visiting her; also that decedent, in admitting, when asked, that he was married, had made inconsistent statements as to the length of time since his marriage, and had once denied that petitioner was Mrs. Byrnes; also that he had introduced another woman as his wife. And contestants adduced evidence tending to show that petitioner was a woman of loose character, who had been married, had a child, left her husband, and gone to live with another man, before living with decedent. There was no proof of any express marriage contract.

Held, that the contradictory declarations of decedent, the character and conduct of the parties, and the many suspicious circumstances which petitioner did not controvert, led to the conclusion that she was not the widow of decedent, and that her petition must be denied.

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THIS was an application by one styling herself Helen A. Byrnes, and claiming to be the widow of decedent, John W. Byrnes, late of Buffalo, for letters of administration of his goods, etc. ; opposed by decedent's brothers and sisters, his only next of kin.

The facts appear sufficiently in the opinion.

VILLIAM & POTTER, *for petitioner.*

LEWIS & RICE, *for next of kin.*

THE SURROGATE.—The verified petition in the matter alleges that the petitioner is the widow of the deceased, and that he left brothers and sisters, his sole next of kin. The latter contest the application, alleging that the petitioner is not the widow of the deceased ; that he was never married to her. On the hearing, no express contract of marriage was proven, but the petitioner, to sustain the allegation of the petition that she is the widow of the deceased, proved by a number of witnesses facts tending to show that she was married to and lived with him, as his wife, for thirteen months, and down to the time of his death, which occurred suddenly on February 8, 1881, by the falling of the N. Y. C. R. R. depot. She also introduced in evidence a letter from the deceased, written a short time before his death, in which he signs himself as her husband. On the other hand, the contestants offer evidence tending to show that, before living with Capt. Byrnes, the petitioner was a woman of loose character ; that she had been married and had a child, but had left her husband and gone to live with another man, and finally lived with the deceased ; and that, after the petitioner and the deceased had begun to live together, after he had repeatedly introduced her to respect-

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able people as his wife, and had taken her to a respectable boarding-house and lived there with her as his wife, and had taken out life insurance in her name as his wife, they had had some trouble and she had brought a civil suit against him for \$500, damages for assault and battery, in her name as Helen Dibble, and had sworn to the complaint by that name. The parties began to live together in December, 1879, or January, 1880. The suit was brought and the complaint sworn to, May 18, 1880, and the amended complaint to the same effect was sworn to, June 11, 1880. The petitioner then proved that the suit was settled, and the parties resided together as husband and wife until the death of Captain Byrnes; that, during the latter period, he frequently held her out to be, and introduced her as, his wife; that, after his death, his body was taken to her house and buried from there; and this evidence is relied upon, to sustain the allegation of the petition, that the petitioner is the widow of the deceased.

In *Brinkley v. Brinkley* (50 N. Y., 197), Judge FOLGER says; "The law is well settled that a man and woman, without the presence of a witness, without the intervention of a minister, or magistrate, by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves and to society as such; and if, after that, the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was in the beginning an actual *bona fide* and valid marriage.

"We are aware, however, that the wise caution of

the courts has set hedges about this rule. To presume, from the fact of cohabitation, that there has been an actual marriage, it must be matrimonial and so begun, and not illicit. It is not the fact alone which raises the presumption, but the character of the fact. The parties must not only live together as do man and wife, but to become man and wife *must be a purpose in beginning so to live*; and they must hold themselves out to the world as thus related; and the courts will not by testimony that is not clear and explicit, that is not general and supported by other circumstances, nor by reputation for marriage that is divided, raise such a presumption."

In this case, we first hear of the petitioner and the deceased together in the summer and fall of 1879, and later, about the first of January, he is introducing her in respectable society and living with her as his wife, which relation continues to exist down to about the opening of navigation, when, as the result of an affray between them, she brings an action against him in her name of Helen Dibble, and swears to the complaint; this is on May 18, 1880. The wording of the verification is: "Helen Dibble being duly sworn says that she is the plaintiff named in the foregoing complaint; that she has heard said complaint read and knows the contents thereof, etc.," and it is signed by her "Helen Dibble." Later, and on June 11, 1880, an amended complaint to the same effect is signed and sworn to by her, the verification being worded in the same manner, and the signature being the same. The allegations of the complaint are, that he struck the plaintiff and knocked her down and kicked her; these assaults took place on the 2d, 3d,

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and 8th days of May, 1880 ; and she demands judgment for \$500 damages.

Prior to this time, and in the month of April, 1880, the petitioner called on Mr. Robbins, who was Byrnes's attorney, for counsel ; and then stated that her name was Helen Dibble, and that Byrnes had been visiting her, and that one Anna Williams was annoying her. It appears, by M. P. Robbins's testimony, that the suit by Helen Dibble against Byrnes was settled September 28, 1880 ; but before the suit is settled he resumes his relations with her, and introduces her as his wife, and lives with her, as before, and down to the time of his death in February, 1880. In the meantime, about the month of May, 1880, Dr. Carl H. Guess went out on Captain Byrnes's tug, and, evidently having some doubts in the matter, asked Byrnes, "John, are you married?" He says, "Yes (and kind of laughed), I have been married over a year." Afterwards, in the fall, after the tug was laid up, Captain Scanlon had a conversation with Byrnes, at his home on Ohio street, and asked him, "How long have you kept house, John?" I spoke in that way to him. He says, "Since I got off the tug." Then I turned round to him and looked at him, and says I, "John, are you married?" He said, "Yes." I says, "How long have you been married?" He says, "Five or six months, about that." Both these witnesses were evidently skeptical ; and on the cross-examination of Patrick O'Hara, a witness for the contestants, he swears, "I know he told me once she wasn't Mrs. Byrnes;" and the weight that might attach to Byrnes introducing the petitioner as his wife is done away with by the fact that he had also been in the habit of introducing the woman Williams as his

wife. Taken altogether, the case seems to be one of those which is without the hedge set around the rule laid down by the court of appeals. As Judge FOLGER says, in the opinion cited, there would seem to be a notion too prevalent that, in the State of New York, as no form nor ceremony, nor civil nor religious rite is essential to the validity of a marriage, so any cohabitation of a man and woman, no matter how or with what motive begun, may, by the false assumption of the marital relation some time continued, by the false acknowledgment and recognition of each other as husband and wife, for a space kept up, and by an ill-founded general reputation, grow into the real, valid and lawful state of matrimony, with all its reciprocal rights, liabilities, duties and obligations. There is an air of the suspicious, all about the present case, which leads me to think it is one of the latter class of cases. There is no proof of any marriage contract. The relationship between the parties, when begun, was an illicit one. The introduction and holding out of the petitioner, as his wife, by Byrnes, from December to May, is shown to be false. The contradictory declarations of Byrnes to various persons, as to the time of his marriage, are consistent with his other declaration that the petitioner is not Mrs. Byrnes; and the character and conduct of the parties at so recent a date as to make them fresh in the memory of all the parties and witnesses, and the many suspicious circumstances connected with and surrounding them, which the petitioner does not take the trouble to deny; all these lead me to the conclusion that the petitioner is not the widow of the deceased, John W. Byrnes.

The prayer of the petitioner must be denied.

Ordered accordingly.

BLOSSOM v. SIDWAY.

ERIE COUNTY.—HON. ZEBULON FERRIS, SURROGATE.—
April, 1882.

BLOSSOM v. SIDWAY.

In the matter of the will of THOMAS BLOSSOM, deceased.

The testator, in his will, desired his executor, and the wife of the latter, to "fix some valuation" of the furniture, books and other articles in his house, of which he might be possessed at his decease, and distribute them among his "relatives mentioned" in his will, "as they may deem discreet and proper." There were legatees who were relatives by marriage. *Held,*

- 1 That testator intended the articles to be divided into shares of equal value, and that the discretion conferred related only to the allotment of the various equal shares among the beneficiaries, which must be made *per capita* and not *per stirpes*.
2. That, in the absence of an express provision to the contrary, the relatives intended were relatives by blood, and not by affinity.

FRANKLIN SIDWAY, the executor named in the will of decedent, in his petition for the probate of the will, asked for a judicial construction of the fourteenth clause thereof, which read as follows: "*Fourteenth.* The furniture, books and other articles in my house, of which I may be possessed at my decease, I desire Mr. Sidway and his wife to fix some valuation, and distribute them among my relatives mentioned in my will, as they may deem discreet and proper."

JACOB STERN, *for executor.*

J. C. BEECHER, *special guardian.*

THE SURROGATE.—The first question presented by the argument of the counsel is, whether the discretion to be exercised by the executor and his wife extends to anything more than the mere distribution of the various

lots of equal value into which the articles mentioned in the said clause are to be divided by them, or whether they may allot, to the several legatees, such articles, of whatever value, as they may deem proper. I think the intent of the testator was to have the allotments equal, since he has directed that the articles be valued. This would be unnecessary, were the discretion intended to be without limit, and to authorize the executor and his wife to make the allotment without regard to their valuation. The discretion reposed in the executor and his wife, I think only relates to the allotment of the various equal shares, to the several legatees.

The next question presented is as to whom the testator intended to include in the term, "my relatives mentioned in my will." The word "relatives," used generally in a will, is construed to mean the testator's next of kin, who would take under the statute of distributions, in case he had died intestate (2 *Jarm. on Wills*, 4 Am. ed., 34). In this case, it is used in a limited sense, and the relatives are specifically mentioned, to wit: "The relatives mentioned in my will," and the rule does not apply, as the identity of the relatives to be benefited is established by the limitation (*Id.*, 35).

But there are legatees who are relatives by marriage, and the question is further made, whether they can be brought in, to share in the legacy given by this clause. I think not. A gift to next of kin or relatives does not extend to relatives by affinity, unless the testator has subjoined to the gift expressions declaratory of an intention to include them; such as a bequest expressly to relatives "by blood or marriage" (*Maitland v. Adair*, 3 *Ves.*, 231; *Devisme v. Mellish*, 5 *Id.*, 529).

MATTER OF LUDLOW.

It follows, from the foregoing construction of the clause in dispute, that the executor and his wife will appraise and divide the property mentioned therein into shares of equal value, and distribute the various shares to the legatees who are mentioned in the will, being blood relatives of the testator; allotting the shares, in their discretion, to the several legatees. The allotment to be *per capita* and not *per stirpes* (2 *Jarm. on Wills*, 4 Am. ed., 35).

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—November, 1880.

MATTER OF LUDLOW.

In the matter of the final accounting of FORDHAM MORRIS, executor, etc., of THOMAS W. LUDLOW, deceased.

Chapter 18 of the Code of Civil Procedure has not made any material change in the mode of appointing special guardians for infants, in proceedings before Surrogates.

Under section 2580 of that Code, the Surrogate "must" appoint a special guardian, where the infant does not appear by his general guardian, and where he does so appear, the Surrogate must inquire into the facts and must appoint a special guardian, if, for any reason, the interests of the infant require it. No application for the appointment of a special guardian is necessary; the Surrogate may act of his own motion.

It seems, that under section 2581, the infant may apply for the appointment of a special guardian. Notice must be given under that section, only when the application is by a person other than the infant.

ANNIE C. LUDLOW, an infant over fourteen, presented a petition for the appointment of a special guardian, etc., to take care of her interests in this matter; and questions

arose as to the necessity of such petition, and as to the necessity of giving notice of the appointment.

EDGAR LOGAN, JR., *for petitioner.*

THE SURROGATE.—I do not see that chapter 18 of the Code of Civil Procedure makes any material change in the mode of appointing special guardians, in proceedings before me, from that formerly practiced. Before the Code, the special guardian was appointed on the return day of the citation or order, without any application being made for that purpose. Section 2530 of the Code provides that, where an infant is a party, and does not appear by his general guardian, "the Surrogate must appoint" a special guardian. Where he appears by his general guardian, the Surrogate must inquire into the facts, and must appoint a special guardian if there is any ground to suppose that the interests of the general guardian are adverse to those of the minor; or that, for any other reason, the interests of the latter require the appointment of a special guardian. No application to the Surrogate is needed in such case; it is a duty imposed upon him by the new, as by the old statute. If, on the return of a citation, no application for the appointment of such guardian should be made by any one voluntarily, the Surrogate has no power to compel it to be done; and if he could not appoint of his own motion, all further proceedings in the matter would come to a stand, or else fail to be of any binding force as to the minor.

It is inferentially implied by section 2531 that the infant may apply; but, as stated, it is wholly unnecessary. It is only in the case of the application by any other person than the infant that notice must be given under the last named section.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—February, 1881.

HURD v. CALLAHAN.

In the matter of the estate of PATRIOK CALLAHAN, deceased.

The mere omission, by the holder of a bond and mortgage, to proceed against the mortgagor, does not, in the absence of a request by the guarantor, discharge the latter, though the value of the land has depreciated so as to be inadequate to pay the amount due.

One who "guarantees the payment of a bond and mortgage," engages to pay not only the principal, but the interest which may accrue thereon.

When a mortgagee assigned the bond and mortgage with a guaranty of payment, and died; and thereafter the mortgage was foreclosed, and a judgment for deficiency recovered, the proceeds of sale, being more than sufficient for the purpose, having been applied by direction of the court to the payment of costs, fees and taxes, on foreclosure, *Held*, that those sums could not be considered as being any part of the adjudged deficiency, the whole of which constituted a debt which decedent's real property might be sold, etc., to pay.

East Riv. Bank v. McCaffrey, 8 Redf., 97,—approved.

APPLICATION by a creditor, to mortgage, sell or lease decedent's real property to pay his debts.

On November 17, 1871, John Finagan executed a bond and mortgage to decedent, to secure the payment of \$782.50, in three years, with interest. On April 6, 1872, Callahan assigned the bond and mortgage to James Blackwell, the assignment containing a clause as follows: "the party of the first part hereby guarantees the payment of the said bond and mortgage." In March, 1873, Blackwell assigned the same to William C. Hurd. Callahan died March 23, 1874, leaving a will, of which Ellen Callahan, his widow, was executrix. Interest was paid on the bond and mortgage to November 17, 1875. In

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1879, Hurd commenced an action to foreclose the mortgage, making the executrix a party defendant, and asking a judgment for deficiency, if any, against her and the obligor. A defense upon the merits was interposed by the executrix, the issue was tried, and a judgment of foreclosure and sale resulted. The premises were sold for \$800. Out of this sum, there was paid \$156.26, costs, \$45.25, referee's fees and disbursements, and \$49.73, taxes; and the residue, \$548.76, was paid to the plaintiff in the action. This left a deficiency of \$480.08, for which judgment was entered on May 15, 1880. In June of the same year, the executrix rendered an account of her proceedings as such, from which it appeared that the assets of said Callahan were insufficient to pay his debts. Thereupon, Hurd commenced these proceedings to obtain an order to mortgage, lease or sell the real estate of decedent to pay his debts. On the hearing, these facts were established, when it was proposed to prove, on behalf of the heirs, that the mortgaged premises had depreciated in value, from the time the mortgage became due, to the time of foreclosure and sale, about one-third. This was objected to, as immaterial.

Counsel for petitioner cited *Brown v. Curtiss* (2 *N. Y.*, 225); *Looney v. Hughes* (26 *N. Y.*, 514); *East River Nat. Bank v. McCaffrey* (3 *Redf.*, 97).

Counsel for the widow and heirs objected that the petitioner, having been guilty of *laches*, was not entitled to the order sought (*People v. Jansen*, 7 *Johns.*, 332); that the guaranty did not apply to the payment of interest, after the principal became due (*Hamilton v. Van Rensselaer*, 43 *N. Y.*, 244), nor to taxes; that the costs and referee's fees (with the taxes) were a part of the amount of

the deficiency, and the real estate was not liable for their payment (*Sanford v. Granger*, 12 *Barb.*, 392; *Wood v. Byington*, 2 *Barb. Ch.*, 387; *Ferguson v. Broome*, 1 *Bradf.*, 10).

M. G. HART, *for petitioner.*

M. J. KEOGH, *for widow and heirs.*

THE SURROGATE.—The objection to the proof offered as to the depreciation in value of the mortgaged premises was well taken. The case of *People v. Jansen* has been overruled, and is no longer to be regarded as an authority (5 *Amer. Dec.*, 275, and *note*, 279). In no case is a surety discharged by mere *laches* of the creditor, unless after a request to prosecute the principal (*Looney v. Hughes*, 26 *N. Y.*, 514). The mere neglect of the holder of the bond and mortgage to proceed against the mortgagor, does not discharge the guarantor, though the value of the land become so depreciated as to be ultimately inadequate to pay the amount due (*Brown v. Curtiss*, 2 *N. Y.*, 225).

Callahan guaranteed the payment of the bond and mortgage. This was a guaranty of payment, not only of the principal, but also of the interest that might accrue thereon. The case of *Hamilton v. Van Rensselaer* (43 *N. Y.*, 244), cited by counsel for contestants, is not in point. There the guaranty was for the punctual payment of interest on a bond to run for several years, payable yearly, and an agreement to pay it on demand, in default of its payment by the obligor. It was held that the guaranty did not extend to the payment of interest accruing after the bond became due, as was claimed by the plaintiff. Ch. J. CHURCH remarked that the construction contended for by the plaintiff might render the contract as burden-

some *as if it had been a guaranty of the payment of the principal itself.*

It has been repeatedly decided that the real estate of deceased persons can only be sold in a proceeding like this, to pay their debts, and that the costs of actions brought against the executor or administrator to recover them, are no part of such debts. This is undoubtedly the law. The only question on this subject, in this case, is whether the deficiency in the amount realized embraces the costs, etc. The holder of the bond and mortgage exhausted his remedy against the land, and the supreme court has adjudged that the proceeds of sale were insufficient to pay the same; and the amount remaining due thereon, for principal and interest, is the amount of the deficiency. The costs of the foreclosure were incidental to the endeavor to collect out of the mortgaged premises; and although they were first paid out of the proceeds of sale, they cannot justly be considered as constituting any part of the amount still due on the bond and mortgage. I am to ascertain what remains due, and I find that \$548.76 has, through legal proceedings, been paid thereon, and that there is still due \$480.08, with interest thereon from May 15, 1880. No costs, as such, are included in this balance. The sale, if ordered, is for the purpose of paying it, and not to pay any costs.

Upon a guaranty of payment only, the holder *may* proceed, in the first instance, against the maker; but if he does so, and subjects himself to costs, he cannot afterwards recover those costs of the guarantor, because he had his action, in the first instance, against the guarantor, and need not have incurred costs in an action against

the maker (*Theobald on Principal and Surety*, 90 ; *Tuton v. Thayer*, 47 *How. Pr.*, 180). But suppose the plaintiff in foreclosure had not made the executrix a party in that action, and had afterwards sued her on the testator's guaranty, to recover this deficiency, he would have obtained a judgment for the whole amount, with costs. Then he could have made a like application to this, and the amount of that judgment, exclusive of costs, would have been the debt against the decedent, he was entitled to recover in the proceeding.

In the case of *Mosher v. Hotchkiss* (3 *Keyes*, 161), although it was a case of guaranty of collection, the court lays down the abstract rule, as one of the reasons why the guarantor should not be allowed to have the costs of an action against the principal deducted from an amount collected from him and applied to the principal,—that where a sum of money has been collected by action against the principal debtor, the surety can have no equity to demand that so much of the money as shall be necessary to pay the expense of the collection, shall be withheld from that object, and be applied exclusively to satisfy the principal of the debt. The creditor is entitled to the whole of his demand, and the expenses of collection were legitimately deducted from the sum realized by execution against the principal debtor.

The case of *Ferguson v. Broome* (1 *Bradf.*, 10), cited by counsel for the heirs, was decided before the enactment of *Laws* 1869, ch. 845, which protects *bona fide* purchasers for value, after the lapse of three years from the date of letters testamentary, or of administration, which thus robs this right of the creditor of its character as “a hidden and tremendous lien.” The case was de-

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cided upon sound principles, as the law then stood, but is no longer an authority, in so far as its reasoning is in conflict with the provisions of that act. The language of that law implied that a sale may be made, on the application of a creditor, which is not presented until after three years has elapsed since the granting of letters. This proceeding having been commenced in July last, is unaffected by the provisions, on this subject, of the new Code.

While this case presents a different question from that discussed in the *East River Nat. Bk. v. McCaffrey* (3 *Redf.*, 97), and I do not, therefore, propose here to consider it, yet I am inclined to think the conclusion there reached to be sound.

The amount of the deficiency, with interest, must be established as the amount due to the petitioner.

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—March, 1881.

HEILMAN v. JONES.

In the matter of the probate of the will of DAVID JONES, deceased.

A creditor of a testator, not being a proper party to proceedings for the probate of his will, cannot invoke the authority conferred upon the court by Code Civ. Pro., § 2481, subd. 6, to open, vacate, etc., the decree admitting the will. Nor, *it seems*, can he ask for revocation of probate, under § 2647, permitting such an application by "a person interested in the estate."

It seems, that chapter 18 of that Code nowhere authorizes revocation of

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probate for want of jurisdiction; and that a decree granting probate, upon a petition showing jurisdiction by reason of decedent's residence in the county, after citation of the necessary parties, is conclusive on the question of such residence, except upon appeal.

APPLICATION to revoke probate of a will.

On January 21, 1881, a verified petition was presented to the court, setting forth, among other things, that David Jones was, at the time of his death, a resident of the county of Westchester; that he died in the city of New York on January 17, 1881, and alleging that the Surrogate of Westchester had jurisdiction to take the proof of the will, etc.; and praying for the issuing of a citation, in the usual form.

The citation was accordingly issued, and was duly returned, with proof of service on all the persons required by statute to be cited. Thereupon, no objection being made by any of the persons so cited, the will was proven, admitted to probate, and letters testamentary duly issued to the executors.

On March 9, 1881, Elizabeth Heilman, claiming to be a creditor of the testator to the amount of \$10,000, procured an order, based upon an application in which she alleged such indebtedness, and that the testator was, at the time of his death, a resident of the city and county of New York, requiring the executors to show cause why the probate of said will should not be revoked, on the ground that the Surrogate of Westchester had no jurisdiction in the premises.

E. MARSHALL PAVEY, for petitioner.

MARTIN J. KEOGH, for executors.

THE SURROGATE.—The cases in which application

may be made for the revocation of the probate of a will are specified in section 2647 of the Code. The grounds are two only : 1st, allegations against the validity of the will ; 2d, the competency of the proof thereof.

On the presentation of a petition under this section, citations must be issued to the executors, all the devisees, legatees and other persons mentioned in section 2649. The executors are the only persons brought into court, in this matter. It is quite apparent, therefore, that as no allegations are made against the validity of the will, nor the competency of the proof, this is not a proceeding under article 2 of chapter 18. That chapter nowhere confers upon this court the power to revoke a probate for lack of jurisdiction ; but by subdivision 6 of section 2481, authority is conferred upon it to open, vacate, or set aside a decree or order, in like case and in the same manner as a court of general jurisdiction may exercise such powers. Can a creditor of the deceased, who was not, and could not properly be, a party in the probate proceeding, raise this question of jurisdiction now, when it has already been passed upon without objection from any one who had a right to make it ? I think not.

The petition showed that the testator was a resident of this county. On the return day of the citation, had any person cited raised this question of residence, which is jurisdictional, I should have deemed it my duty to try and determine it, as I have repeatedly done in other cases ; but were the order, admitting the will to probate, to be opened or vacated under the authority contained in above subdivision 6, this applicant, not being a party to the proceeding in which that order was made, could not

be heard in reference to any new order, any more than she could have been in the original proceeding.

As has been stated, had any issue been made as to the question of jurisdiction, by a proper party, it would have been tried and disposed of, and an appeal could have been taken by any party feeling aggrieved thereby. I know of no other mode by which the question can be determined. Jurisdiction having been conferred by the verified petition, all proper parties having been duly notified, the will admitted to probate, and the executors having entered upon the discharge of their duties, this court has no option in the matter, but must retain control to the end.

It is provided by section 2474 of the Code, that "the Surrogate's court obtains jurisdiction in every case by the existence of the jurisdictional facts prescribed by statute, and by the citation or appearance of the necessary parties;" and, by section 2475, that "jurisdiction, once duly exercised over any matter, by a Surrogate's court, excludes the subsequent exercise of jurisdiction by another Surrogate's court over the same matter."

In the case of *Monell v. Dennison* (17 *How. Pr.*, 422), the court, speaking in reference to a question relating to the jurisdiction of a court like this, says: "Where the jurisdiction of a subordinate tribunal, having cognizance of the general subject, has attached by the presentation of a verified *prima facie* case, and by the appearance of the parties, its decision, even on a *quasi* jurisdictional fact, such as that of inhabitancy, must be conclusive, unless reversed on appeal."

I must confess my utter inability to comprehend what advantage the applicant could hope to derive from

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a shifting of jurisdiction. Her claim is \$10,000 against an estate estimated to be of the value of at least \$10,000,000. Surely, if her claim be just, there can be no reasonable doubt of its recovery, here or elsewhere.

The application must be denied, with costs against her, to be taxed.

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—June, 1881.

TOMPKINS v. MOSEMAN.

In the matter of the estate of WRIGHT HORTON, deceased.

Although Code Civ. Pro., § 2818, makes no provision for the *mode* of appointing a successor to a *deceased* testamentary trustee, the proper course is indicated by section 2481, subd. 11; which is to follow the practice of the late court of chancery.

Accordingly, on an application for a citation to show cause why such an appointment should not be made, *Held*, that a bond should be required of the appointee, and, it being discretionary with the court to what persons notice should be given, that service of the citation should be made on all the next of kin of the testator, residing in the county.

PETITION for the appointment of a successor to a deceased testamentary trustee.

The will of Wright Horton was admitted to probate in Westchester county, in 1861. By its provisions, he bequeathed certain general legacies, after the payment of which, and of his debts, he gave the rest and residue of his estate to his children in certain shares. To his daughter, Martha Ann Tompkins, he gave, besides a legacy

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of \$50, one-half of one-eighth of said residue. By a codicil, he revoked this provision and gave the same to his son, Frost Horton, in trust, to invest and pay the income to her for life, no disposition of the remainder being made. The sum which came into the hands of the trustee was \$690. The trustee died in 1880, leaving a will, of which Stephen D. Horton was appointed executor. The estate of Wright Horton had long since been distributed and settled, the only surviving residuary and general legatees, other than Martha A. Tompkins, being Betsey A. Moseman, Peter Q. Horton, Elizabeth Williamson, Amy A. Irish and Harriet Irish. Mrs. Tompkins presented a petition alleging the above facts, showing that there were no creditors of said Wright Horton, and praying for the issuing and service of a citation upon all persons interested in the estate of said Wright Horton, deceased, to show cause why one Elias Q. Horton should not be appointed trustee, in the place and stead of said Frost Horton, deceased.

D. W. TRAVIS. *for the petitioner.*

THE SURROGATE.—It is provided by section 2818 of the Code of Civil Procedure that “where a sole testamentary trustee dies, or becomes a lunatic, or is, by a decree of the Surrogate’s court removed or allowed to resign, and the trust has not been fully executed, the same court may appoint his successor; unless such an appointment would contravene the express terms of the will. Where a decree, *removing* the trustee, or discharging him upon his resignation, does not designate his successor; or the person designated therein does not qualify; the successor must be appointed and must qualify, as

prescribed by law for the appointment and qualification of an administrator with the will annexed." It will be seen that the mode of appointment of a successor, as provided by the latter clause of the section, applies only to the case of the *removal*, or *resignation* of a trustee, and not where the vacancy arises from death or lunacy. This omission would seem to have occurred in this wise. In the report of the commissioners, in 1875, to the legislature, provision was made for the appointment of a successor only where the trustee had been removed, or permitted to resign, the commissioners remarking in a note to section 2587, of the report, that they were "not disposed to recommend the extension of the power to vacancies created by death, insanity, etc." While, in a note to section 2818, now the law, they say of it: "It also confers power to fill vacancies created by death or insanity." Hence, the reported section was amended simply in those respects, leaving the latter clause untouched, and thus failing to point out the mode of procedure for the appointment of a successor where the vacancy was created by death or insanity. But the court is relieved from any embarrassment on the subject, by the provisions of subdivision 11 of section 2481, which declares the Surrogate to have power "with respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court having, by the common law, jurisdiction of such matters, except as otherwise prescribed by statute."

It appears that, by the codicil to the will of the testator, no disposition is made of the fund after the death of the *cestui qui trust* in any manner; and whether it will

pass to his next of kin, or to the residuary legatees named in the will, other than the *cestui qui trust*, it is unnecessary to inquire, as in either case the persons are the same. The names of these are not all stated in the petition in this matter, nor is it deemed important, although it might be proper, that they should be.

In looking into the course and practice of the late court of chancery, which had jurisdiction of all cases relating to trusts, it will be found that it was the practice to require a bond of a new trustee appointed in place of one who had died or been removed, and which practice is followed by the present supreme court in the exercise of equity powers (*People v. Norton*, 9 *N. Y.*, 176; *Matter of Robinson*, 37 *Id.*, 261). It is also held, in the case last cited, that, in a matter of this kind, where such bond is required, it is discretionary with the court, to whom notice shall be given.

Exercising such discretion in this case, I think it will suffice to direct the service of a citation upon all of the next of kin who are residents of this county. Among these are Betsey A. Moseman and Peter Q. Horton, the only surviving children of the testator.

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—June, 1881.

COCKS v. BARLOW.

In the matter of the estate of JOHN COOKS, deceased.

One named as *cestui que trust* in a will may take, under its provisions, in trust for himself and others.

An executor and trustee who, although having qualified, never acts or attempts to act as such, receives none of the funds, and is not cognizant of or consulted in respect to the management of the estate, is not liable for the acts of a co-trustee.

A *cestui que trust* may, by executing a formal release, discharge all or any of several trustees from liability for a breach of the trust.

Where an annuity given by will is derived from the bequest of a fixed sum, the beneficiary may assign his interest,—the provisions of 1 R. S., 730, §§ 63, 65, relating to the alienation of trust interests, even if held to include trusts of personalty, not applying to such a case.

The testator died in 1868, leaving an estate of \$125,000, a widow, and five children, as follows: two married daughters, A. the husband of F., and B. the husband of G.; one unmarried daughter, C.; and two sons, D. and E. (the latter not *sui juris*). By his will, he appointed his widow, all his children, and his sons-in-law, executors, directing them, within three months after his death, to invest, on bond and mortgage in Westchester county, funds sufficient to yield an annuity of \$1,000, to be paid to his widow during life or widowhood, and dividing the rest of his property among his children, E.'s share being in trust for life, with remainder to his issue. The widow qualified as an executrix, but D. and F., a son and son-in-law, partners in business, assumed the exclusive management of the estate, and were the only active executors. On May 1, 1870, over \$100,000 having been divided among themselves by the children, and no investment having been made for the widow, \$10,000 was lent, at the instance of D., on mortgage upon lands in Wisconsin, at ten per cent. interest, to provide for her annuity. This investment proved disastrous, and the widow protested against it, on learning that it had been made. The other executors acquiesced. D. and F. failed in 1876, after which the widow received no considerable portion of her income. About the same time, all the executors, except the widow, gave her their personal bond conditioned to pay her the annuity, which was not complied with, whereupon B., G. and C. paid her \$1,800, and obtained a release from all claims. On an application by the widow for a decree that the co-executors pay her

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the arrears of income, and make the required investment, and be removed from office, etc., *Held*,

1. That the investment in Wisconsin was a glaring breach of trust; for which, however, the widow was not responsible, not having been consulted, nor having acquiesced either as co-trustee or as *cestui que trust*.
2. That by her release she had discharged B., G. and C. from liability.
3. That the decree must be against A., F. and D., directing payment of the arrears of annuity and interest, and that they invest, as directed by the will, a fund necessary to produce the annuity, having regard, in fixing the amount, to the effect of the payment of the \$1,800.
4. That the prayer for removal was inconsistent with the other relief asked, and must be denied.

Williams v. Thorn, 70 N. Y., 270,—distinguished.

JOHN COCKS died in 1868, seized and possessed of an estate valued at about \$125,000. He left him surviving a widow, Adelia Cocks, and five children, to wit, Mary, Phebe, Anna, David and Harrison, Mary being then the wife of George J. Barlow, and Phebe the wife of Daniel E. Haviland. He left a will, of which he appointed his widow and all of his children and their husbands executors. Among other things, the will directed the executors to invest, within three months after testator's decease, sufficient funds on bonds and mortgages in Westchester county, to yield an annual income of \$1,000, to be paid to his widow for life or widowhood. The rest of his estate he divided equally among his five children, but provided that David's one-fifth should be invested in like manner, and the income be applied to the support of himself and family during his life, with remainder to his children. The testator left upwards of \$45,000 in bonds and mortgages. These were mostly paid in, prior to January 1, 1869, when the proceeds, together with other moneys received, amounting to about \$85,000, were divided among the five children, David's share being paid to George J. Barlow, who was then his committee, but

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had since been duly discharged by the supreme court. No investment had been made, to produce the widow's annuity as required by the will, up to the last named date, but it had been regularly paid. In July, 1869, another sum of upwards of \$2,100 was divided among the children, and again on May 1, 1870, still another sum of nearly \$20,000 was divided in like manner. At the same time, an investment of \$10,000 was made on mortgages on real estate in Wisconsin, at the rate of ten per cent. interest, to secure the payment of the widow's annuity. After a few years, this investment proved to be somewhat disastrous, and failed to produce the income, but it was paid with more or less regularity down to 1877. Barlow and Harrison Cocks, who were copartners in the manufacturing of bricks, and in a store at Croton Landing, were the acting executors, receiving and disbursing the moneys of the estate, but all joined in the execution of conveyances of real estate which they were authorized by the will to make. Cocks and Barlow kept the accounts of the estate in their firm books, the most important of which cannot now be found. The firm became insolvent in 1876, and since then no considerable portion of the income had been paid. About the same time, all the executors, save the widow, executed to her a bond conditioned that they would personally, not as executors, pay her the annuity. They failed to comply, and Mr. and Mrs. Haviland and Anna Cocks (then Varney), in consideration of a release from their liability on the bond, executed to them by the widow, and of all liability as executors or otherwise, paid her a gross sum of \$1,800.

These were the leading facts developed in the course

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of a proceeding based on an application of the widow, on which an order was made, requiring her co-executors and executrices to show cause why they and each of them should not account to her for the arrears of her annuity, then claimed to be about \$2,000, and why they should not be decreed to pay it; why they should not be decreed to invest the fund to produce the annuity; and why they should not be removed as executors, and a trustee appointed in their stead.

JAMES A. HUDSON and RAPHAEL J. MOSES, JR., *for the petitioner.*

HENRY C. NELSON and M. L. COBB, *for Mr. and Mrs. Haviland, and Mrs. Varney, executors.*

F. LARKIN, *for Mr. and Mrs. Barlow, D. Cocks, and H. Cocks, executors.*

THE SURROGATE.—Unfortunately, this is by no means an exceptional case. Violations of testamentary trusts, the faithful execution of which should be regarded as a sacred duty, have become alarmingly frequent. If those to whom such trusts are confided could but be impressed by the conviction that the only path of safety for themselves and those whose interests are placed in their charge, is that which leads to a strict and rigid adherence to the letter and spirit of the instrument from which their power is derived; if they could be made more thoroughly aware of the danger always attending the possession of and power over moneys that do not belong to them, such instances would be more rare. But, doubtless, as long as human nature remains unchanged, as long as men will hazard loss for the sake of gain, this condition of things may be expected to endure.

Here, I think, is a glaring instance. It would have

required about \$16,000, invested according to the provisions of the will, to have produced the annuity, while \$10,000, invested in a western State, would yield the same result. Therefore, the difference could be, at once, divided among the children. Hence, a violation of the plainest possible direction was hazardous, and to the loss of all concerned.

The first question to be considered is, what, if any, remedy has the widow? By the will, she was constituted one of the trustees, for herself and also for David Cocks. Her appointment as such was valid (*Perry on Trusts*, § 59). If, therefore, she aided in the violation of the trust created for her own benefit, I think she would be without remedy other than such as she might have against that portion of the diverted fund which still remains. But it is quite apparent that she took no part in the violation of the trust. She was the second wife of the testator, and all of the five children were his offspring by a former wife. It does not appear that she was consulted by them with reference to the management of the estate, or took any part therein, except to join in the execution of conveyances. While she qualified as executrix by advice of counsel, without understanding what she did, I find no evidence whatever that she did, or attempted to do, any act as executrix or trustee. She never received any of the funds of the estate, other than her annuity, and seems to have been treated as a stranger by the other executors, in so far as the management of it was concerned. It, therefore, would seem that she should be regarded as never having entered upon the duties of the trust, and is not obnoxious to the charges and penalties of a violation of it. It

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is true, she apparently accepted the office of executrix, and would by that act be deemed, ordinarily, and in the absence of further evidence, as having accepted the trust also (3 *Redf. on Wills*, 530) ; but I think I am justified by the facts in finding that she did not accept it ; which it was competent for her to do (*Green v. Green*, 4 *Redf.*, 357). Again, if she acquiesced in the breach of the trust, as *cestui que trust*, as she was competent to do (*Perry on Trusts*, § 849), she would be without remedy in so far as the loss of the fund is concerned, but only where the acquiescence was of longer continuance than could be claimed in this case. When she first heard it had been done, she protested against it. Hence that is no valid objection. Is she debarred from her claim by reason of the setting apart of the sum of \$10,000, so invested, to produce her income? *Perry on Trusts* (§ 574), lays down the rule, as gathered from authorities cited by him, that where a fund is set apart to produce the income and it is lost, it seems the testator's estate cannot be held for the loss. That rule, I apprehend, is only applicable where the fund is set apart in compliance with, and not in violation of the terms of the trust.

Having thus reached the conclusion that Mrs. Cocks, notwithstanding these apparent obstacles, is not without remedy, the next question for consideration is, what is that remedy? The bulk of the estate was divided among the legatees, exclusive of the \$10,000 investment for the widow's benefit, and was paid to them on and prior to May 1, 1870, the last dividend being made on the last named day. That was proper, provided a suitable provision had been made to secure the widow's income. Whatever was so divided belonged to the children re-

spectively, subject, however, to such claims as might be established against them, for the violation of any trust with the execution of which they were charged.

Harrison Cocks was the originator of the idea of investing the \$10,000 in Wisconsin, and seems to have consulted the other trustees, except the widow, in regard to it. Mrs. Haviland and Mrs. Varney doubted the propriety of the act, but so far acquiesced in it afterwards as to render themselves equally liable with him and the others, had they not subsequently taken such measures as to shield themselves from its legal consequences. Some few years since, the widow threatened some proceeding in this court with a view to enforce the payment of her income. It was, however, abandoned on the executors giving their personal bond with a condition for the payment of the same to her, and providing that her acceptance of the bond should in no wise interfere with or prejudice her rights under the will. Some negotiations occurred, having in view a settlement with her by paying her a sum of \$4,500 in gross, which she agreed to take, but the parties failed to pay the amount. Subsequently she released Mr. and Mrs. Haviland and Mrs. Varney from their liability on the bond and as executors, etc., for a valuable consideration. I can discover nothing in that transaction savoring of fraud. They had had nothing to do with the management of the estate, and their liability to her as executors might well be considered by her as doubtful, and they paid her their share of the gross sum of \$4,500. Cocks and Barlow, the managing executors, had become insolvent, and the affairs of the estate were in confusion. She had power to execute a valid release to them (*Lewin on Trusts*, 637, etc.; *Perry on*

Trusts, § 851). By that instrument, I must regard them as discharged from all liability in this matter, except as to a bond and mortgage of \$4,000, representing that portion of the \$10,000 invested by Harrison Cocks in Wisconsin and held by Mrs. Haviland. That belongs to the estate, and the widow is clearly entitled to any benefit which may be derived from it. It should, however, be disposed of or foreclosed, and the sum realized should be invested according to the terms of the trust. Mrs. Haviland also holds other securities belonging to the estate. When the insolvency of Cocks and Barlow occurred, she very properly possessed herself of what she now holds, with the view of protecting the estate as far as possible. They are of uncertain value, but whatever may be realized from them will belong to the estate. How much belongs to the trust in favor of David Cocks, it is, perhaps, immaterial to inquire, as he appears before me, in this matter, solely in his character as executor and trustee, and asks no relief as *cestui que trust*.

As David Cocks' wife and children are not parties to this proceeding, I can make no decree settling the account, that would bind them, as they have a right to be heard in regard thereto. All that is incumbent upon me in this respect, is, as I think, to so far examine into the condition of the estate as to ascertain the relief to which the widow may be entitled. Having done so, I am satisfied that there should be in the hands of the executors more than sufficient to pay the arrears of the annuity due to her. George J. Barlow is the only one of the executors who has filed an account of proceedings, and this has been accepted as sufficient, and the litigation has been in regard to it. This is significant as showing that

he, or at most, he and Harrison Cocks, have been mainly, if not entirely, the managers of the affairs of the estate. While he credits himself with \$9,500 paid to the widow, he fails to charge himself with all of the income received, or for which he is accountable, on the investment necessary to produce the annuity, which is justly chargeable. He also fails to charge himself with about \$700 of interest moneys received on the purchase-money paid by Harvey Farrington. He also credits himself with the amount of the mortgage stated by him at \$4,400, assigned to Mrs. Haviland. This cannot be allowed, as it still belongs to the estate. It was neither the payment of a debt or legacy, and simply shifts the responsibility for it from him to her.

It is not easy to determine whether a decree should be made directing the investment of the whole fund requisite to produce the entire amount of the annuity of \$1,000, complicated as the question is by the transaction between the widow and the Havilands and Mrs. Varney, but I am inclined to treat it, as the parties regarded it, as the payment of a sum in gross for their release from liability, and that the fund to be invested must be diminished *pro rata*, as of that date. In other words, if her life estate was then worth, say \$8,000, the \$1,800 paid by them should be deducted from it, and the sum to be invested should be such as would have then entitled her to a gross amount of \$6,200. I think it was competent for the widow to accept a sum in gross, in lieu of the annuity, and also to release, in proper form, any or all of the executors. It has been a mooted question whether the statute (1 R. S., 730, §§ 63, 65), applied only to trusts involving the management of realty, and not to trusts of

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personalty. However that may be, it does not apply where a fixed sum is given as a legacy (*Booth v. Ammerman*, 4 *Bradf.*, 129; *Exp. McComb, Id.*, 151; *Degraw v. Clason*, 11 *Paige*, 136). The bequest being of a sum in gross, the cases of which *Williams v. Thorn* (70 *N. Y.*, 270) is a type, do not apply.

It is clear that the executors, Barlow and Harrison Cocks, and the executrix, Mrs. Barlow, are liable for the arrears of the annuity, with interest. As to the executor, David Cocks, I think he is not liable. For some reason, he was not treated by the testator as a person capable of managing his own affairs, and after his father's death, he was so adjudged by the supreme court, and Mr. Barlow was appointed committee of his estate. At the very time when the trust was violated, he was not *sui juris*, and cannot, therefore, be held responsible for that act. He does not appear to have taken any part whatever in the administration of the estate, and his affairs I judge to be in such a condition that a decree against him would be of no avail. However that might prove, I think the decree should be against Mr. and Mrs. Barlow and Harrison Cocks.

The relief sought, in other respects, is somewhat inconsistent, as this court is asked to remove the executors, and to compel them to invest the fund. Of course, if they are removed, their functions cease, and they cannot proceed to invest. Again, if they should be removed, the widow still remains as trustee, and no new trustee could be appointed unless she resign, for if she has not acted as trustee, she has an undoubted right to do so. She may decline to act, or ask to have her resignation accepted, and should it be, then, in either event

she could apply for the removal of the others. If that application were granted, it could only be done on their rendering a settlement of their accounts to all parties in interest.

On the whole, I think the petitioner entitled to a decree for the payment of her arrears of annuity and interest against the persons above indicated, and also that they invest, as directed by the will, a fund necessary to produce the annuity; having regard, in fixing the amount, to the effect of the payment of the \$1,800, as above determined. Costs to the petitioner, to be taxed, are allowed against Mr. and Mrs. Barlow and Harrison Cocks.

Decreed accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—June, 1881.

PECK v. SHERWOOD.

In the matter of the estate of BENJAMIN PECK, deceased.

Upon an application by a legatee, under Code Civ. Pro., § 2606, to compel the representative of a deceased executor to account for and deliver over trust property, and pay the legacy, the respondent filed a verified answer denying the receipt of any such property, which answer was not controverted. *Held*, that this terminated the proceeding, the petitioner having no right to insist on continuing, in order to prove the amount due her, as a basis for an action on the deceased executor's official bond.

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Whether payment to a legatee can be decreed under Code Civ. Pro., § 2603, *quære*.

APPLICATION to compel the administratrix, etc., of the executor of decedent's estate, to account, etc., under Code Civ. Pro., § 2606.

The petition of Anna M. Peck alleged that she was a legatee under the will of Benjamin Peck ; that Warren S. Peck, the executor, etc., of Benjamin, had had possession of the fund out of which her legacy was directed to be paid, and had died intestate ; that Susan T. Sherwood was administratrix, etc., of said executor, and had not accounted for or delivered over any of the trust property which had come into her possession, if any ; and prayed that said administratrix be required to account for and deliver over any of the said trust property in her possession, or under her control, and pay the legacy of the petitioner.

On the return of the citation, issued upon the petition, the administratrix filed a verified answer, alleging, in substance, that Warren S. Peck, the deceased executor, left no assets belonging to the estates of Benjamin Peck, or himself, and admitting the truth of the other matters set forth in the petition.

D. HAIGHT, *for petitioner*.

ODLE CLOSE, *for administratrix*.

THE SURROGATE.—The truth of the answer is not controverted, but the counsel for the petitioner insists that he has a right to proceed and prove how much is due on her legacy, as he proposes to proceed against the sureties to the bond, which this court required, for cause, to be given by the deceased executor in his life-time.

This is a proceeding instituted under section 2606 of the Code. Its provisions are new and important. They are to the effect that where an executor, etc., dies, the Surrogate's court has the same jurisdiction, upon the petition of his successor, or of a surviving executor, etc., or person interested in the estate, to compel the executor of the decedent to account for and deliver over any of the trust property which has come to his possession or is under his control, which it would have as against the decedent, if his letters had been revoked. By section 2603, the substance of the decree which the surrogate, in his discretion, may make, in case of the revocation of letters, is to the effect that the executor shall "pay and deliver over all money and other property in his hands into the Surrogate's court, or to his successor in office, or to such other person as is authorized by law to receive the same," etc. It being conceded that there is no property in the hands of the administratrix of Warren S. Peck belonging to the estate of Benjamin Peck, there is, as it seems to me, no basis for a decree of any kind. It would be idle to decree the performance of an act impossible to be accomplished. It is, therefore, utterly immaterial, in this proceeding, to inquire or determine how much is due upon the petitioner's legacy. I must accordingly decline to enter upon such an investigation.

I think it doubtful, although the expression of the doubt may be considered *obiter*, whether, under any circumstances, payment to a legatee could be decreed by virtue of the provisions of section 2603.

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—July, 1881.

DIXON v. STORM.

In the matter of the accounting of JACOB STORM, surviving executor, etc., of ABRAHAM STORM, deceased.

The common law rule, that a legacy is, in general, payable at the end of one year after the testator's death, and the modification of that rule, contained in 2 R. S., 90, § 43, are inapplicable to the case of a legacy given by the execution of a power of appointment contained in the testator's will.

The testator, by his will, after certain bequests, gave the residue of his estate, real and personal, to his wife for life; empowered his executors to sell any of the real estate, with her consent; directed them, as soon as practicable after her death, to sell all the real estate, and pay one-half the proceeds, and one-half his personal estate, to an appointee to be named in her will. The widow died, leaving a will appointing H. and A. to receive \$5,000, under the power. They had purchased some of the real estate during her life-time, and had given a purchase-money mortgage, which was foreclosed before she died, leaving a deficiency of \$3,000, for which judgment was entered after her decease. Meanwhile, the appointees had assigned their legacy to W. *Held,*

1. That the testator's intent was that the legacy of his widow's appointee should vest immediately upon her death, and that interest then began to run; and that this result was not affected by the fact that sufficient real estate had not been sold to make the payment.
2. That the judgment of \$3,000 must be set-off against the legacy; the deficiency being liquidated before the widow's death, and the assignee having actual or constructive notice of the facts.

It seems, that the assignee, for an antecedent debt, of an insolvent legatee is liable in equity to a set-off of his assignor's indebtedness, against the legacy, even though the latter is not yet payable.

One of the executors handed to his co-executor, whom he supposed to be solvent, \$1,200 of the trust funds, on the suggestion of the recipient, who misapplied the amount and died insolvent, that he could use the same to the advantage of the estate. *Held,* that the surviving executor was liable to the estate for the loss.

Adair v. Brimmer, 74 N. Y., 589,—distinguished.

HEARING of objections to an executor's account.

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The testator's will, which was proved in 1862, after bequeathing certain legacies, gave to his wife a life estate in the residue of his real and personal property. The *eighth* clause empowered his executors to sell any of his real estate, on obtaining the written consent thereto of his widow. The *ninth* clause read: "All the rest and residue of my estate, real and personal, I direct to be disposed of as follows: 1st, I hereby authorize and empower my executors, as soon after the decease of my said wife as may be practicable, to sell and dispose of all my real estate ; and one-half of the net avails thereof, with one-half part of the avails of my moneyed assets, and other personal property not otherwise heretofore devised, I give and bequeath to such persons and for such purposes as my said wife shall lawfully direct and order, in and by her last will and testament;" and directed his executors to pay accordingly. The widow, Julia Storm, died May 25, 1878, leaving a will, by which she appointed Hiram W. Dixon and Angeline Dixon to receive \$5,000, as she was empowered to do by her husband's will. Previously, the executors, with the written consent of the widow, had sold some of the real estate of the testator to the Dixons, and had taken from them a bond and mortgage for \$10,000 to secure a part of the purchase money. This mortgage became due and was foreclosed, and the premises were sold during the widow's life-time, leaving a deficiency, on the sale, of about \$3,000, for which judgment was entered several months after her death. Her will was contested, but was finally admitted to probate in the fall of 1878. In the meantime, and about June, 1878, the Dixons assigned their legacy, appointed to be paid to them by Julia Storm's will, to

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Wesley Dixon. It was claimed that these legatees were insolvent, and that they assigned their legacy in payment of a precedent indebtedness.

During the life-time of the executor Haight, the accounting executor, supposing him then to be entirely solvent, handed over to him \$1,200, money belonging to the estate, on his suggestion that he could use it to the advantage of the estate; which sum, Haight dying insolvent, was lost.

WM. F. PURDY, *for executor.*

CALEB GRIFFIN, *for Wesley Dixon, assignee.*

H. C. GRIFFIN and E. T. LOVETT, *for legatees.*

L. T. YALE, *for executors of Julia Storm.*

THE SURROGATE.—At first, I was inclined to think that the legacies, appointed to be paid by the will of Julia Storm, became due only at the time of the final conversion of the real estate, remaining unsold at the time of her death, and that interest was recoverable only from that time; but on reflection I have come to the conclusion that they became due at her death. The common law rule was that legacies, directly given out of the testator's own estate, were due one year after the death of the testator; and such is still the rule, the time of payment, only, being changed by our statute (2 R. S., 90, § 43). That statute and the common law rule, I think, are inapplicable to the case of a legacy given by the execution of a power of appointment. The legacy in question vested, and became due and payable, on the death of the donee of the executed power. It seems to me that it is very much the same as if the will of Abraham Storm had be-

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queathed the use of \$5,000 to his widow for life, with remainder to the Dixons. On her death it would, in that case, have been due and payable to them at once, and the fact, that it might have been necessary to convert real estate, in order to obtain means of payment, I think, can make no difference. The most of the real estate had been converted at the time of the widow's death, and a large portion of the estate consisted of bonds and mortgages. Having determined that, ordinarily, a legacy given by appointment is due and payable at the death of the person exercising the power, I think it still due and payable then, although all of the real estate had not then been sold (*Wood v. Penoyre*, 13 *Ves.*, 326; *Sitwell v. Bernard*, 6 *Id.*, 539; *Wheeler v. Ruthven*, 74 *N. Y.*, 428).

Where real estate is devised to be sold, for the purpose of distributing the money, Lord THURLOW says, in *Hutchin v. Mannington* (1 *Ves.*, 366), "it is clear that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness: in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence; for it might the very next day, or that very evening; and therefore the court always, in such a case, considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done, which is ordered to be done." This was approved by the Master of the Rolls, in *Elwin v. Elwin* (8 *Ves.*, 547).

Here, no definite words are used by the testator, with any deliberate purpose of fixing the period at which the enjoyment of the legacies was to commence, other than

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at the death of the widow. By the eighth clause of the will, the executors had power to sell any of the real estate, on the written consent of the widow, and more than half of it was, and the whole of it might have been, so sold. By the ninth clause, they were to sell all that remained, "as soon after the decease of my said wife as may be practicable." From my examination of the cases, I am satisfied that the language employed indicates such an intention on the part of the testator, as to the time of payment of these legacies, as to bring them within the rule that they vested, and were payable at once on the death of the widow. If I am right as to the time when the legacy became due, the fact that some portion was to be derived from real estate yet unsold, causing some deficiency of assets, would not prevent its being then payable, although payment was impracticable; and interest from that time must be allowed.

Regarding this point as correctly settled, then it follows that the set-off of the judgment against the legacy should be allowed. The bond and mortgage were due before the death of the widow; a foreclosure and sale had been had, and the deficiency ascertained. The claim was therefore liquidated. The Dixons and their assignee had actual or constructive notice of the facts, and the legacy must be reduced by the amount of the set-off (*Haskin v. Teller*, 3 *Redf.*, 316).

It was alleged, on the argument, and I did not understand it to have been denied, that the Dixons were, at the time of the assignment, insolvent, and made the assignment to pay a debt due the assignee. If that is true, then another and an equitable ground for allowing the set-off is furnished, even if the legacy were not due

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(Smith v. Felton, 43 N. Y., 419). In view of the novelty of the question above determined, and of the importance of the matter to the parties, if the insolvency of the assignors and the object of the assignment are not conceded, I will so far open the case as to admit proofs upon those subjects only.

I think the executor, Storm, is liable for the \$1,200 which he handed over to his executor Haight, on his suggestion that he could use it to the advantage of the estate. Haight misapplied or wasted it, and died insolvent. At the time, he was regarded as solvent and a man of considerable means, although the fact proved to have been otherwise. I am referred to the case of Adair v. Brimmer (74 N. Y., 539), as an authority excusing Captain Storm from liability. In that case, certain stocks and bonds were intrusted to one of the executors, by the others, to sell, on his promise to pay the proceeds into the office where the business of the estate was transacted, which he failed to perform. "He received *these proceeds* in his capacity as executor, and *they never came into the possession or under the control of his co-executors.*" While, here, Storm handed over to his co-executor *money* which belonged to the estate, and it is lost. There is a marked distinction between the two cases. The case cited does not alter the well-established rule (*Redf. Prac.* [2 ed.], 506). The executors were also trustees, and as to the latter the rule is even more stringent (*Id.*, 509; *Bates v. Underhill*, 3 *Redf.*, 365).

Decreed accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—July, 1881.

SPENCER v. POPHAM.

In the matter of the estate of GEORGE L. SPENCER, deceased.

Under Code Civ. Pro., § 2606, the representative of a deceased executor, etc., may be compelled to render successive accounts to each of the persons therein mentioned as having a right to demand an account, etc.

It seems, that the rule is otherwise with respect to an accounting required, under section 2605, of a representative whose letters have been revoked, for, in that case, he may apply for a judicial settlement of his account under section 2732.

A legatee who institutes proceedings under section 2606, wherein a decree is rendered directing the delivery of trust property, is not entitled to a direction for the delivery thereof to himself, but only to a successor in office, or "such other person as is authorized by law" (§ 2603), to receive it, in order to properly administer the same; the object of the section being to enable any one interested to compel the placing of the funds in official custody.

A testamentary trustee who mingles trust funds with his own, and uses them in his business, is chargeable, in the absence of proof by him as to the profits made, with compound interest.

The appointment of a special guardian for a party as a lunatic, upon an allegation of a petitioner in a proceeding for another purpose, is a mere matter of routine, and not an adjudication of lunacy.

A variance between the relief prayed for in a petition, and that specified in the citation issued thereupon, is curable by amendment.

PETITION of Lorraine Spencer, a legatee under the will of George L. Spencer, deceased, to compel Sarah H. Popham, executrix, etc., of William H. Popham, deceased executor, etc., of the first named decedent, to account, etc., under Code Civ. Pro., § 2606.

The petitioner was a legatee under the will of George L. Spencer, deceased. Popham, the executor of Spen-

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cer, was dead, having left a will, of which Sarah H. Popham was executrix. Recently, Catharine S. Hall, having been appointed administratrix with the will annexed of Spencer, and also trustee to execute certain trusts contained therein, instituted proceedings against Mrs. Popham, to compel her to account for and deliver over such of the property of Spencer as had come to her possession; in which a decree was made fixing the amount of such property at \$15,616.09, and directing its delivery to Mrs. Hall, on complying with which, and on filing a proper voucher therefor, it was ordered that she should be discharged from all further liability. Mrs. Popham did, subsequently, file such voucher. The petitioner, as legatee, now asked for a similar accounting from Mrs. Popham, and a delivery, etc., claiming that the whole of the fund had not been accounted for and delivered.

The relief prayed for in the petition was that Mrs. Popham should be directed to account for and deliver over the property belonging to the Spencer estate, in her hands, into the Surrogate's court, or to such person as was authorized by law to receive the same. The order for the citation directed it to be issued to Mrs. Popham, requiring her, as such executrix, to account for and deliver over to Lorraine Spencer, the petitioner, any of the trust property to which she might be entitled under the will of said Spencer. Counsel for the executrix objected that, having accounted to the successor of the executor Popham, she could not be called upon by the petitioner to render another account; and also that the proceedings were irregular because the petition, order and citation differed as to the relief sought.

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D. S. HERRICK, *for petitioner.*CHAS. E. CROWELL, *for executrix.*

THE SURROGATE.—I do not deem the first objection well taken. Section 2606 of the Code, under which this proceeding is instituted, provides that the Surrogate's court, upon the petition of a successor of a deceased executor, or of a surviving executor, or of a creditor or person interested in the estate, has power to compel the executor to account, etc. The objection is that an accounting having been had, on the application of one of the several classes on whom the right to make such application is conferred, precludes its being done by any of the others. It will be seen, by glancing at 2 R. S., 92, § 52, that a creditor, legatee or next of kin could, under the recent law, cause an executor or administrator to render an account. Several creditors or legatees could compel separate accountings, and the only way for the executor to escape the annoyance of frequent accountings, was to apply, under 2 R. S., 93, § 60, for a citation for a final accounting. In case he failed to do so, but proceeded to account on the call of a creditor or legatee, the result was binding only upon such creditor or legatee and himself. The whole subject is now regulated by sections 2726 to 2729, inclusive, of the Code, in so far only as ordinary accountings are concerned, those sections not affecting the accounting, etc., under section 2606. By its provisions, the court has the same jurisdiction to compel an accounting and delivery, which it would have, as against the decedent, if his letters had been revoked. By section 2603, the decree revoking the letters of an executor may, in the discretion of the Sur-

rogate, require him to account, etc. By section 2605, the successor or a remaining executor, administrator, guardian or trustee, may compel an accounting by one whose letters have been revoked; and section 2732 permits an executor or administrator whose letters have been revoked, to apply for a judicial settlement of his accounts, and to have all persons interested cited to attend. I fail to find any provision authorizing the executor of a deceased executor to apply for a citation to all persons interested in the estate of the first testator, to attend his accounting as to that estate. That is probably an oversight, and I think an amendment securing that right to him, would be advisable. As the matter now stands, I do not see how he can escape from being compelled to render successive accounts to each of the persons mentioned in section 2606, as having the right to demand it.

In a case where letters have been revoked and a successor appointed, that successor may, under section 2605, compel the executor to account, and then the removed executor may, under section 2732, apply for a judicial settlement, and ask to have "his successor, *and* the other persons specified in section 2729,"—such "other persons" being creditors, husband or wife, if any, next of kin and legatees, etc.,—cited to attend. If the latter section (2732) were extended so as to cover a case of this kind, it would obviate the difficulty encountered.

An objection was also taken to the regularity of the proceedings, because the petition prays for a form of relief which is different from that specified in the order granting the citation, and in the citation itself. This objection I do not think tenable. The papers may be

amended so as to correspond. No injury is sustained by any one, in consequence of the difference, and the statute authorizes an amendment, or a disregarding of the discrepancy. Both objections are therefore overruled.

It was alleged that Mrs. Spencer was a lunatic. That question the court proposed to try, but no evidence was given on the subject, other than an allegation to that effect, made in a petition in another matter, and wherein the court, as required by law in such case, appointed a special guardian for her. That was a mere routine matter, and was very far from being an adjudication, by the court, that she was a lunatic. I must, therefore, as the matter stands, deem her to be *sui juris*.

I cannot but conclude, from the facts proven, that the testamentary trustee, Popham, neglected to invest the fund as directed by the will, and mingled it with his own money employed in his business. By his letter, in evidence, he acknowledged the amount of the fund to be \$18,000, and used language calculated to lead the *cestui que trust* and her friends to believe that the fund was properly invested. His executrix must, therefore, be held to account, on the basis that the fund was of that amount, and also that he then had on hand \$1,200 of accrued income, as he stated. This letter is much more satisfactory, as evidence, than the books kept by him or his clerks. As Mrs. Popham has failed to show what the profits of the business, of which this fund was a part of the capital, were, compound interest must be allowed.

Whatever amount may be due for principal and interest must be paid to Mrs. Hall, as the person entitled by law to receive it, and Mrs. Spencer may then require at

her hands, as trustee, whatever may be due to her as *cestui que trust*. The counsel for the petitioner claims, however, that the decree should direct the sum due to Mrs. Spencer to be paid to her directly. In this, I think, he misconceives the scope and object of the statute. The provision is general, and is intended to apply to all cases of the death of an executor, administrator, guardian or testamentary trustee, whatever may be the stage of his administration of the trust, when his death occurs. Such an event may occur within a year or a month after receiving his letters, or it may happen after a lapse of three or more years. In either or any of these cases, any one of several creditors or legatees may make application, under section 2606, to compel the accounting and delivery of the property therein provided for. He cannot compel the delivery of the whole fund to himself, as it may be ten times the amount of his claim or legacy, and when his demand may not be due. He can only enforce its delivery to the court, to a successor in office, or to such other person as is "authorized by law" to receive it, (§ 2603), in order that it may be properly administered; and that all other claims, as well as his own, may be taken into consideration and provided for. The chief object of the statute seems to be to enable any one, having an interest in the estate, to take such action as may be necessary for the protection of that interest, by compelling the placing of the fund and property in official custody.

Decreed accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—November, 1881.

BRADY v. McCROSSON.

In the matter of the probate of the will of JOHN McCROSSON, deceased.

The appointment of an executor is not an essential of a will.

The decedent requested A. to ask a scrivener to come and draw his will, at the same time stating that he wished A. to be a witness. On a subsequent day,—that of the execution,—A. and another signed as subscribing witnesses in decedent's presence, after the will had been read in their presence, nothing further being said to A. about signing, but the other witness being duly requested. *Held*, a sufficient request to A.

After the instrument propounded as decedent's will, being a single page of foolscap, containing no appointment of executor, had been read to and approved by decedent, and signed and witnessed at the end, with due formalities, a clause was added at the top of the second page, in the witnesses' presence, and signed by decedent but not by the witnesses, appointing his wife executrix. *Held*, that the first page was decedent's will, and the same should be admitted to probate.

Coffin v. Coffin, 23 *N. Y.*, 9,—compared.

Sisters of Charity v. Kelly, 67 *N. Y.*, 415; *McGuire v. Kerr*, 2 *Bradf.*, 257; *Heady's Will*, 15 *Abb. N. S.*, 211; *Conboy v. Jennings*, 1 *T. & C.*, 622—distinguished.

APPLICATION for the probate of a will. The will offered for probate was written upon a sheet of foolscap paper. All of the disposing parts were written upon a single page, by which decedent made his wife sole devisee and legatee. In it, he named no one as executor. The will was signed by the testator and two witnesses at the foot of the page. After the scrivener had drawn the will under decedent's direction, it was read over to him in the presence of the witnesses; he pronounced it to be as he wished it, whereupon it was executed and witnessed. After this had been done, and the will was

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completed, the deceased wished the names of his wife and the scrivener inserted, as executors. The latter declined the appointment, but drew at the top of the second page an appointment of the wife as executrix, in these words : "I, John McCrosson, also appoint my wife, Jane McCrosson, executor to this my last will and testament;" which was signed by decedent, but not by the witnesses. All this occurred while the witnesses were still present.

Decedent had requested McNamara, one of the witnesses, to see the scrivener, and ask him to come and draw his will, stating, at the same time, that he wished him, McNamara, to be a witness to it. On the day of its execution, nothing further was said to him about signing as a witness, but the other witness was then requested by the testator to sign, and both did then sign as such, in his presence.

FRANCIS LARKIN, *for proponent.*

MARTIN J. KEOGH, *for contestant.*

THE SURROGATE.—The contestant, Mrs. Brady, a daughter of the deceased, objects, first, that the will was not properly executed, inasmuch as McNamara was not, at the time of the execution of the alleged will, requested to sign it as a subscribing witness. I do not regard the objection as of any force. He had been previously requested by the testator to witness his will, to be drawn; he was present at the time it was prepared, heard it read, heard the other witness requested to sign, and signed himself in the presence of the deceased. This I think a stronger case than that of *Coffin v. Coffin* (23 N. Y., 9).

The second objection is that, because the clause

appointing the wife executrix was not signed by the witnesses, therefore the alleged will is void as such. Neither do I deem this objection well taken. The cases cited by the contestant's counsel, to wit, *Sisters of Charity v. Kelly* (67 *N. Y.*, 415); *McGuire v. Kerr* (2 *Bradf.*, 257); and *Heady's Will* (15 *Abb. N. S.*, 211); as well as *Conboy v. Jennings* (1 *S. C. [T. & C.]*, 622), cited by proponent's counsel, each presents a state of facts materially different from that existing in this case. Here, the will was understandingly completed, and the deceased assented to its correctly expressing his wishes, before it was executed. Then, as an afterthought, the matter of the appointment of an executor arose. If the appointment of the executor had not suggested itself to the mind of the deceased until a week or a month had elapsed, and he had then executed such an unattested writing as this, no one, I think, would claim that thereby the previously duly executed will was rendered void. If this be so, then it strikes me that, if done within a day, or an hour, or any shorter period, it would be equally harmless to destroy it.

It was the ancient rule that no paper in the nature of a will would be valid as such unless it contained the appointment of an executor, but such long since ceased to be the law. The statute makes provision for the appointment of an administrator with the will annexed, where no executor is named in the will. I think the will properly executed as such, and that it should be admitted to probate.

Decreed accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—December, 1881.

CAMPBELL v. PURDY.

In the matter of the accounting of SAMUEL M. PURDY and ABRAHAM B. ODELL, executors, etc., of CHARLES CAMPBELL, deceased.

One entitled to a remainder after a life estate given by will is a "person interested in the estate," within the meaning of Code Civ. Pro., § 2726, permitting such a person to apply to compel an executor to settle his account.

Where a will directs executors to sell and convey testator's real and personal property as soon after his death as they shall deem best, and dispose of the proceeds, the Surrogate's court has no power to order a sale of the realty in compliance with such direction, but, as to the personalty, it is the executors' duty to *deem it best* to sell as soon as can conveniently be done; and where a loss occurs in consequence of their neglect so to do, they are chargeable with the amount.

An attorney who is executor cannot be allowed any *costs* in actions relating to the estate; otherwise as to disbursements and expenses.

The sum of \$200 is not an extravagant expenditure for a tombstone, where decedent's personal estate is \$26,000.

THIS was a judicial settlement of the account of executors, initiated by petition of an infant interested in the estate.

The will of the testator, admitted to probate in January, 1875, in substance directed the executors to pay his debts and funeral expenses; also to sell and convey all his real and personal property as soon after his death as they should deem best, and out of the proceeds to pay the funeral expenses, debts and expenses of administration. The balance he directed them to divide into two equal parts, one of which they were ordered to pay to his daughter Hannah, and to invest the other in the purchase

of real estate, to be held in trust for his son Benjamin B. Campbell, he having the right to occupy it for life with remainder to his children ; or to invest it on bond and mortgage, at his option, for his benefit during life, with like remainder. Benjamin had a wife and several children. For some cause, she left her husband, taking the children with her ; and she was subsequently appointed their general guardian. She, as guardian for Charles Campbell, an infant, was the petitioner in the first instance, in this matter. On the return of the citation, the executors filed a petition, and brought in all parties in interest.

The testator's homestead, consisting of about five acres of land with dwelling, remained unsold, the reason alleged being the depressed value of real estate. The inventory showed personal assets to the value of about \$24,000, and the account disclosed a net increase, swelling it to the sum of about \$26,000. A part of the assets was a bond and mortgage on real property, on which \$16,280 remained due, when the mortgage was foreclosed; and, the sale not producing the amount due, the executors purchased the mortgaged premises, and still held them, being unable to dispose of the same advantageously. This foreclosure suit was commenced in the life-time of the testator, through Mr. Purdy, the executor, as attorney, and proceeded so far as to the adjustment of costs, which were taxed at \$422.73. After his death, the complaint was amended, and other proceedings had in the case, in which Mr. Purdy's costs were taxed at \$203.32, which sum was claimed as an item of credit in the account. Objections were filed to the account, which are discussed in the opinion; and the

executors contended that Charles Campbell, the original petitioner, through his guardian, could only compel the filing, by them, of an intermediate account; that the account was so filed merely for the purpose of disclosing the acts of the executors and trustees, and the condition of the estate or fund in their hands; and that the estate was not in a condition for a final accounting, in consequence of their inability to convert the real estate, with advantage, into money.

JAMES R. MARVIN, *for the executors.*

BATES & HENRY, *for objector.*

THE SURROGATE.—Assuming that the executors are such testamentary trustees as are contemplated by title 6 of chapter 18 of the Code, of which there may be serious doubts, the will in this case makes them such trustees only of the share of Benjamin B. Campbell. As to Hannah's share, they are simply executors, clothed with a naked power of sale of all the real estate. Hence, they may account as executors, and may be compelled to do so. They may also be compelled by the petitioner to render an intermediate account as trustees, by virtue of section 2803, the petitioner being "a person interested in the estate or fund" of which his father is beneficiary for life. Had they rendered such an account on his petition, no decree could have been entered thereon, under that section, the account being filed merely for the information of the court and those interested in the fund.

I think too, that the petitioner had a right to proceed under section 2726, as "a person interested in the estate or fund." He is entitled to a share, in remainder, of his father's share, after the payment of funeral expenses and

debts. He is, therefore, interested to see that the executors have not expended too much for the burial, monument, etc., and also to see that they have not paid claims as debts, which were illegal or invalid. Could he establish that they had, he would, in so far, increase the amount of the fund which he is to share, at his father's death, with the other children, of his father.

On the return of the citation, the executors properly proceeded, under section 2728, for a judicial settlement of their accounts. Hence, I regard the matter as correctly before me, for the purpose of settling the accounts so far as the executors have proceeded.

The executors have never entered upon the discharge of their duties, as trustees of the share of Benjamin B. Campbell, for the reason that they have never placed themselves in a condition to do so. In order to ascertain the half of the residue of the estate, over which they were made trustees, the real estate had to be sold. This, for reasons which have been given, has not been done. It is immaterial to inquire into the sufficiency of these reasons, as this court has no power to order a sale of any real estate owned by the testator at his death. Here, at this time, only their accounts as executors are to be scrutinized. Before proceeding to do so, it may be proper to remark that the executors are directed, by the will, to convert the whole estate, real and personal, into money, as soon after the death of the testator as they should deem best. This was clothing them with a discretion as to the time of sale, which, in so far as the realty is concerned, a competent forum will see is properly exercised. As to the personal property, inventoried at \$525.25, this court has jurisdiction to determine what,

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if any, liability attaches to the executors by reason of any neglect of duty in relation thereto. This should have been sold at once by the executors, and converted into money. The will directed such conversion, and the executors should have "deemed it best" to effect it as soon as it could have been conveniently done. The proceeds would have entered into the bulk of the estate, for the purposes of the will. Instead of doing this, they suffered a portion to be consumed by those not entitled to it, and another portion to be removed and used by the wife of Benjamin B. Campbell, who separated from her husband, taking her children with her. She had no right in, or title to, these goods individually, or as guardian of her minor children. The executors will perceive that, when they eventually account to these children for the principal of the trust fund, the latter can compel them to account for at least one-half the value of these goods. The fact that this proceeding was instituted by one of these minor children can make no difference. His general guardian cannot bind him as to property of which she, as such, had no legal possession or control. The executors are not entitled to credit for the goods inventoried at \$525.25.

The interest, taxes, insurance premiums and repairs belonged to the executors to pay. Benjamin B. Campbell was not made, by the will, a life tenant of any real estate of which the testator died seized, and it was the duty of the executors to properly care for and protect it, until they could effect a sale.

The item of \$203.32 for costs and services of Mr. Purdy, one of the executors, must, in so far as the costs only are concerned, be disallowed. It is well settled

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that an attorney, who is executor, cannot be allowed out of the estate any costs, in actions relating to the estate. He may, however, be allowed any expenses or disbursements he may have incurred or made in such actions (*Collier v. Munn*, 41 *N. Y.*, 143). There is no proof before me, showing what was the amount of those paid by him in that action. I have, however, examined the taxed bill of costs on file in the clerk's office, and find them to be \$57.82. If that is conceded to be correct, he will be allowed that sum ; otherwise, I am disposed to permit the executors to introduce evidence on the subject. It may be proper to remark that, if the premises had sold for a sum sufficient to cover the amount due *and* the costs, the executor would have been entitled to receive the whole of his costs out of the proceeds. Possibly, in case of a sale by the executors, hereafter, for enough to cover the whole amount of the judgment, including costs and interest, Mr. Purdy may be entitled to the whole amount, but at present he cannot be permitted to do so.

In view of the magnitude of the estate, I do not regard the item of \$200, for a tombstone, as extravagant.

Undoubtedly, the executor's duty was and is to convert into money the real and personal estate with all possible dispatch, and to pay and invest the proceeds as directed by the will, having, however, a due regard to the interests of the estate. If they could not sell the real property except at a great sacrifice, they had a right and it was their manifest duty to forbear a sale, provided there was a probability of its rising in value within a reasonable period. At the same time, it must not be

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forgotten that the beneficiaries cannot have their just rights indefinitely postponed by any considerations. A sale at a great sacrifice might be more beneficial to them, than an enhanced price after years of waiting and want. The executors state that they now deem the time propitious, and design soon to effect such sales. When that is done, there will, as already suggested, be an opportunity for a more complete adjustment of the affairs of the estate. In the meantime, a decree should be entered adjusting the account, in compliance with the views herein expressed. Costs of the accounting are awarded to the executors, and a proper allowance will be made to the contestant, to be paid out of the fund.

Decreed accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—December, 1881.

DUNCAN v. GUEST.

In the matter of the estate of ELSIE A. HEELAS, deceased.

The creditors of a distributee are not proper parties to an accounting of the administrator before the Surrogate, and cannot contest the validity of the assignment of such distributee's share.

G., as next of kin of the intestate, was entitled to a distributive share of the estate, which he assigned to his wife. His creditors attached, in the hands of the administrator, the share so assigned, claiming that the assignment was fraudulent and void. Upon the accounting of the administrator, the creditors sought to intervene and to prevent the payment of the share to the wife until the validity of the assignment to her could be settled. *Held*, that the creditors had no standing in the Surrogate's court, and that the share must be paid to the wife as assignee.

Sections 2743 and 2745 of the Code of Civil Procedure,—construed.

DUNCAN v. GUEST.

MOTION to amend a decree rendered on the judicial settlement of administrator's account.

The decedent died intestate in 1878, leaving, among other next of kin, entitled to the personal estate, Isaac B. Guest. In 1880, he duly assigned his distributive share to Charlotte W. Guest, his wife. He was then owing some debts, which his creditors, David Duncan and others, sought to recover by attaching, in the hands of the administrators, the share so assigned, claiming that the assignment was fraudulent and void. Mrs. Guest, as assignee, was a party to this proceeding, the object of which was to settle judicially the account of the administrator. These creditors of Mr. Guest were not parties, but they sought to intervene and prevent the payment of this share until the validity of the assignment could be settled in a proper forum. A decree having been rendered, authorizing the administrator, among other things, to retain this fund until the further order of the court, a motion was now made so to amend the decree as that it should direct the payment of the fund to Mrs. Guest.

M. J. KEOGH, *for administrator.*

S. V. R. COOPER, *for Mrs. Guest.*

TREADWELL CLEVELAND, *for creditors.*

THE SUBROGATE.—An opportunity is now offered for the proper consideration of the point discussed, which was not presented when the decree complained of was made.

I think it quite clear that the creditors of a distributee are not proper parties before me on an accounting.

Only creditors of the decedent, or those claiming to be such, can appear or be heard. Section 2743 of the Code enumerates the classes of persons among whom can be decreed the distribution of the funds of the estate, and creditors of a distributee are not named among them. Section 2745 declares in what cases the decree must direct a sum sufficient to meet a claim against the decedent to be retained by the executor or administrator.

As the statute now authorizes the court to decree payment to an assignee of a legatee, next of kin, etc., if the assignor were to appear on such an accounting, and dispute the validity of the assignment, doubtless it would be the duty of the court to hear and determine the controversy, in order to decree payment to the person entitled thereto, but a mere creditor has no such right. The application to amend the decree in the manner sought must be granted.

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—January, 1882.

SPENCER v. SEE.

In the matter of the accounting of JAMES S. SEE, and others, executors, etc., of JOHN MILDEBERGER, deceased.

The claim of a legatee under a bequest upon a *contingency*, or where there is a possibility coupled with an interest, is assignable in equity; otherwise as to a bequest upon a *condition precedent*, before performance. M. died in 1871. leaving both real and personal estate, three grandsons, A.,

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B. and C., his only descendants, and a will whereby, after certain bequests, he ordered his executors to invest the residue of his realty and personally on bond and mortgage, the interest to accumulate until the times afterwards mentioned. He then devised and bequeathed to A. one-third, and to C. one-third of his realty and personally, to be paid to them, respectively, at marriage. The remaining one-third he devised and bequeathed to A., at his marriage, in trust to pay the interest thereof semi-annually to B., "upon the express condition" that the latter renounce the Roman Catholic priesthood, payment of interest to commence at the time of renunciation; and, upon condition that B. should marry, he devised and bequeathed such third, with accumulations, to B., absolutely. Should B. die before marriage, his share was given to A., at marriage. M.'s will empowered, but did not order, his executors to sell and convey any and all of his realty. C. married in 1879, and received his third. On September 2, 1881, A. married; on September 15, B. released and assigned, under seal, to A., all his rights under the will, and A. received from the executors \$28,000, on account of the two shares; on September 26, A. died, leaving a will. A contest arising between the executors of M. and of A., on the formers' accounting, as to the ownership of B.'s third,—*Held*,

1. That, the scheme of the testator, M., requiring a conversion, the will must be deemed to treat of personally only.
2. That the bequest of B.'s third was not upon a *contingency*, but upon *conditions precedent*, neither of which had been performed; that, therefore, the legacy did not vest in interest, and nothing passed by B.'s assignment to A.
3. That A. had a possibility coupled with an interest in B.'s third, and, should B. never renounce or marry, his third would pass to the representatives of A.
4. That the fund of which A. was made trustee passed into the hands of his executors.

Whether the Surrogate's court has power to appoint a trustee of a fund in such a plight, *quære*.

JOHN MILDEBERGER died in the year 1871, leaving a will. His only descendants were three grandsons, Seymour H. Spencer, Selden M. Spencer and William E. Kenyon. He died seized and possessed of both real and personal estate. After bequeathing certain legacies, the will proceeded as follows :

"*Sixth*. After my death, I hereby order and direct my executors hereinafter named to invest all the rest,

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residue and remainder of my real and personal property in bonds and mortgages in the county of Westchester, on property worth double the amount, with interest at seven per cent., payable half yearly, farms being preferred, said interest to accumulate until such times as are hereinafter named.

“*Seventh.* I give, devise and bequeath to my grandson Selden M. Spencer one-third of all my real and personal estate not hereinbefore disposed of, to be paid to him at the time of his marriage.

“*Eighth.* I give, devise and bequeath unto my said grandson, Selden M. Spencer, at the time of his marriage, one other third of my real and personal estate not hereinbefore disposed of, *in trust* to pay the interest thereof semi-annually to my grandson, Seymour H. Spencer, upon the express condition that the said Seymour H. Spencer shall renounce the Roman Catholic priesthood, said payment of interest to commence at the time of such renunciation ; and, upon the further condition that the said Seymour H. Spencer shall marry, I give, devise and bequeath the said money held in trust, together with the accumulated interest thereon, to my said grandson Seymour H. Spencer.

“*Ninth.* I give, devise and bequeath the one other remaining third of all my real and personal property not hereinbefore disposed of to my other grandson, William E. Kenyon, at the time of his marriage.

“*Tenth.* In case of the death of the said Seymour H. Spencer before marriage, I give, devise and bequeath his said share to my grandson Selden M. Spencer, at the time of his marriage.

“*Fourteenth.* I do hereby authorize and empower my

executors hereinafter named to sell all or any of my real estate, and to give good and sufficient deeds therefor."

W. E. Kenyon married in 1879, and shortly thereafter received his one-third. On September 2, 1881, Selden M. Spencer was married. On the 15th of the same month, after said marriage, Seymour, by deed under seal, duly released and assigned all his rights under the will to Selden, and on the same day the executors paid to Selden \$28,000, on account of the two shares. Afterwards, and on the 26th of the same month, Selden died, leaving a will which was duly admitted to probate, the executors of which now claimed that they were entitled to receive, from the executors of John Mildeberger's will, the one-third referred to in the eighth clause of the will, as well by virtue of that will as of Seymour's assignment; that the true intent, as gathered from the will, was that, upon Selden's marriage, the one-third mentioned in the eighth and tenth clauses should vest in him, subject to being divested by Seymour's renunciation of the priesthood, and marriage; that the title thereto did so vest in Selden as a vested remainder, and was so vested at the time of the assignment by Seymour, "descendible, devisable and alienable"; that the assignment by Seymour freed the estate, already vested in Selden, from Seymour's contingent estate, and it thereupon became a full estate in Selden.

On behalf of the executors of Mildeberger, it was claimed, among other things, that Seymour had no assignable interest, and that the fund must remain in the hands of a trustee to be appointed by the court, to await the performance of the conditions by Seymour.

On the part of Seymour, it was insisted that, as it

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was personal estate, if it should be determined that nothing passed by the assignment, the executors of Selden were entitled to the fund.

L. T. YALE, *for executors.*

ALEXANDER & GREEN, *for executors of S. M. Spencer.*

DANIEL WHITFORD, *for S. H. Spencer.*

THE SURROGATE.—The first question to be considered is whether the funds of the estate are to be treated as real or personal property. Counsel for one party bases his argument partially upon the idea that they are to be regarded as land, while the other counsel proceeds upon the theory that they are wholly personal, the fact being that they consist partly of personal property belonging to the testator at the time of his death, and partly of the proceeds of real estate sold by his executors under the authority contained in the will. What portion was purely personal, and what proceeds of sales of realty, does not appear. The question—to which they are to be regarded as belonging, and whether wholly to one, is not discussed by the learned counsel; but it seems to me to be essential first to determine that point, in order to a correct disposal of some questions arising in the case. It is true, then, that the testator does not, in terms, order a sale of his real estate, but does clothe the executors with authority to sell. But, as they cannot execute the provisions of the will as to the residue of his estate, without effecting a sale of the real estate, and as the scheme of the will requires such sale, it was obviously the intention of the testator to blend both real and personal into a money fund, to be invested by the exec-

utors as directed. Sir JOHN LEACH, V. C., in *Smith v. Claxton* (4 *Madd.*, 484), cited in *Marsh v. Wheeler* (2 *Edw. Ch.*, 159), says that "a devisor may give to his devisee either land or the price of land at his pleasure; and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose to give land to the devisee, the land will descend to his heir; and if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate." (See *Dodge v. Pond*, 23 *N. Y.*, 69). Hence, as to any question here involved, the will must be regarded as treating of mere personal estate. In so far, however, as the effect of the assignment by Seymour is concerned, it can make no material difference, as the rules applicable to the validity and effect of it are substantially the same, whether it be real or personal.

The bequest to Seymour is based upon two conditions, neither of which has been performed. During the lifetime of his brother Selden, and after his marriage, he assigned to him by deed, under seal, all his interests under the will. The chief question for consideration, in that regard, is—had he any interest which was assignable? It has been long since settled that contingent interests, both in real and personal estate, are transmissible, like vested interests, and that a possibility coupled with an interest is assignable in equity (*Jones v. Roe*, 3 *Term R.*, 88; *Jackson v. Varick*, 7 *Cow.*, 247; *Winslow v. Goodwin*, 7 *Metc.*, 363; and many more recent authorities). But the will does not create an interest depending upon a mere contingency; it attaches a condition precedent to the gift. A *contingency* is some

specified time, thing or event, in the future, which may or may not occur. A *condition precedent* implies an existing fact, or state of facts, which must be so changed as to bring it into a condition desired. It is also a general rule that, if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance (2 *Jarm. on Wills*, 5 Am. ed., 510, n.); but of course, that is a right personal to himself. Mr. Jacobs (*Law Dict.*, tit. "Condition"), says that "conditions precedent are such as must be punctually performed, before the estate can vest." In *Loder v. Hatfield* (71 *N. Y.*, 98), it is declared to be a general rule that a postponement of the time of payment, even, will not of itself make a legacy contingent, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. *Jarman on Wills* (vol. 2, 429) also lays down the rule that a legacy does not vest where a condition is to be performed by the legatee.

If a man release all his right in land, this extends to all his present right, though he has a present right only to a reversion or remainder, after an estate for life or years *in esse*; also though he has only a possibility upon a condition broken, or a contingency. There is a distinction between possibilities which are releasable and those which are not. When there is an *existing right* in one, which cannot be defeated by the volition or action of another, to a future estate upon a contingency, there is something upon which a release might operate (*Miller v. Emans*, 19 *N. Y.*, 384). But where the only existing right is to fulfill or not to fulfill the condition, nothing passes by assignment, because it is not a material right,

but is purely personal. Here, where there is a condition precedent and a possibility of performance, no interest arises until compliance with the condition, which was a condition precedent to the legacy's vesting (*Caw v. Robertson*, 5 *N. Y.*, 134). There is no present capacity in Seymour to take, and therefore the legacy is not vested in interest. It would be absurd to say that, disregarding the assignment, he has an interest which is transmissible to his personal representatives; but, should he never renounce nor marry, the fund in question, at his death, would pass to the personal representatives of Selden, as to whom there was such a possibility coupled with an interest as to render it assignable by him in equity.

It is very plain that the testator intended to make no gift whatever, unless the first condition, which is affirmative and precedent, was complied with. While, therefore, I am satisfied that nothing passed by the assignment, still I think it may operate as an estoppel against Seymour, in the hands of Selden's executors.

I am further of opinion that the fund of which Selden was made trustee, being personal assets, passes into the hands of his executors. It is, therefore, unnecessary to discuss the question whether this court has power to appoint a trustee in such a case, although I am free to say I think it has not.

Decreed accordingly.

MEEKER v. CRAWFORD.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—January, 1882.

MEEKER v. CRAWFORD.*

In the matter of the judicial settlement of the account of SAMUEL M. MEEKER, and three others, as trustees under the will of WILLIAM LAYTIN, deceased.

The provisions of *Laws* 1850, ch. 272, and *Laws* 1866, ch. 115 (each expressly amending 2 *R. S.*, 94, § 66†), affected only cases of express trusts, and possibly powers in trust, authorized by statute, and had

* In *TYLER v. HART* (Westchester county, HON. OWEN T. COFFIN, Surrogate, January, 1882), it appeared that the will of John Hart directed his executors to sell and convey his real estate, and, with his personal estate, to make a division into four equal parts; to pay one of said fourth parts to each of three children; and to invest one-fourth part on bond and mortgage, and pay the income thereof, for life, to his child Abigail J. Hart, remainder over. The executors had an accounting in 1863, when they were allowed full commissions on the whole fund of \$53,747.30, amounting to \$712.44. They also rendered a supplemental account in 1866, when they were allowed \$45.75, commissions on the funds which came into their hands since the last accounting. The decree directed the executors to invest the fund. The executor Tyler then took charge of the fund of which Abigail was entitled to the interest, and invested it as directed by the will, the other executor, Gedney Hart, having nothing to do with it. Tyler died in 1881, leaving a will, of which William H. Tyler and Elias J. Hunt were executors. The latter, on accounting to Gedney Hart, the surviving executor of Hart, for the funds in Tyler's hands, claimed that they were entitled to full commissions on behalf of Tyler as trustee of the fund.

THE SURROGATE.—This case is clearly covered by the opinion in that of *Meeker v. Crawford* (*supra*), and the commissions as claimed are disallowed. The executors of Tyler, however, are allowed commissions at the rate of one per cent., on all amounts of income received and paid out, and the half of that sum on such as has been received and is now handed over to his survivor.

In *YOUNG v. YOUNG* (decided at the same date, and by the same Surrogate, as *Tyler v. Hart*), it appeared that the testator, after directing the

† Expressly repealed by *L.* 1880, ch. 245.

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no bearing upon the question of commissions where the offices of executors and so-called testamentary trustees are inseparably united in the same persons; and where such is the case, only single commissions can be allowed.

An executor, clothed with a power in trust, who has already had or is entitled to full commissions on \$10,000 or over, cannot have full commissions, but can be allowed only one per cent. on annual income received and paid over; except, *it seems*, in the single instance where, on an accounting, annual rests are made for the purpose of compelling him to pay interest upon periodical balances which he should have invested.

When an executor, who is directed by the will to hold a fund in trust, renders his account as executor and retains such fund, he can have full commissions then, and will be entitled to only one per cent. on the income thereafter received and paid over, where he has already had commissions on \$10,000 or over.

It seems, that double commissions are not allowable on the transfer of an estate from one executor or trustee to another, unless such other is directed by the will to take and hold it upon a separate and distinct trust; and the mere closing up, by executors, of their duties as such, and retaining the fund for beneficiaries under the will, does not effect such transfer.

The testator, by his will, gave his realty and personalty, amounting to over \$1,400,000, to his four executors in trust, to pay debt, etc., and divide the residue into five shares, the income of which they were to receive and apply to the use of his five children, respectively, during life, and, after the death of any child, to distribute the principal of his share

payment of his funeral expenses, debts and legacies, gave the residue of his real and personal estate to his executors and the survivor of them, *their successors, heirs and assigns*, as joint tenants, upon trust to rent, manage, sell and invest the same, and to pay the income, in certain proportions, to certain beneficiaries for lives or terms of years, with remainder over. The inventory filed disclosed personal assets of the value of \$1,457,641. In 1875, the executors rendered an account, and were then allowed commissions amounting to upwards of \$16,000. By the account now rendered, it appeared that the amount of income received and paid over, during the year 1881, was \$162,000. On this amount, they claimed full commissions as trustees.

THE SURROGATE.—The cases of *Stagg v. Jackson* (1 N. F., 206); *Hall v. Hall* (78 N. Y., 585); and *Hood v. Hood* (85 N. Y. 561), all are in point to show that the accounting parties are executors only. The decision in *Meeker v. Crawford* (*supra*), furnishes the reasons why I must refuse to grant any greater commissions than one per cent. upon the fund.

See *Matter of Roosevelt*, *post*.

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among the grandchildren. The will also gave the executors power to sell real estate, but provided that no securities should be sold. In 1877, the executors accounted, and were, by the decree, allowed half commissions, amounting to over \$20,000, for receiving, and directed to retain and keep invested the balance of the estate, pursuant to the will. They thereafter paid over income quarterly, deducting therefrom one per cent. for each of three executors. On the death of one child, an accounting was had, with a view to the distribution of the principal of her share; the executors having sold securities held by them, for that purpose. They claimed half commissions also as trustees on the entire capital which came into their hands as trustees, and half commissions on the fifth about to be distributed. Various objections were filed to the account. *Held*,

1. That the functions of the executors, as such and as trustees, were inseparable, and they could not have full commissions in both capacities.
2. That, as the will did not give the income of any specific sum to any child, but the amounts to produce the income were uncertain, commissions on income paid over were deductible therefrom, and not a charge on the estate at large.
3. That the executors, in retaining their commissions on income, did not violate the rule forbidding appropriation of funds without allowance by the Surrogate,—their account having been settled on a previous accounting; but that they had no right to take half commissions at once, on first receiving the funds of the estate.
4. That, in view of the amount and character of the estate, the employment of a clerk by the executors, at \$600 annual salary, was proper, and his compensation a reasonable disbursement.
5. That, notwithstanding the prohibition to sell securities, such a sale was intended and justifiable, being necessary to a distribution of the share of the deceased child.

The act of 1866 (ch. 115), was the only law authorizing Surrogates to allow commissions to testamentary trustees. *It seems*, that by its repeal in 1880, the subject of such commissions was left wholly unprovided for, except (under Code Civ. Pro., §§ 2736, 2811), in a case where the personal estate exceeds \$100,000.

THE decedent, by his will, devised and bequeathed his entire estate, real and personal, to his executors *in trust*, to pay debts and certain legacies; to build a family vault; and to divide the residue into five equal shares, and receive the rents, income and profits of each share, and apply them to the use of his five children,

severally, for life, and at the death of each life beneficiary, to pay and distribute the principal of that share to and among grandchildren of the testator equally, etc. The executors were also clothed with power to sell the real estate.

In 1877, the executors rendered an account before the Surrogate, and a decree was entered fixing one-half their commissions, for receiving, at between \$23,000 and \$24,000, and directing the executors as trustees to retain the balance of the estate then in their hands, amounting to upwards of \$1,430,000, to be held and kept invested by them as directed by the will. There was another accounting by them in 1879, but the amount of commissions then retained did not appear in the decree, and the amount then in their hands was about \$4,000 in excess of that found on hand at their first accounting. It appeared that they had paid over the income to the children quarterly, and taken receipts in full therefor, deducting therefrom one per cent., for each of three of the executors.

Mrs. Ricard, one of the five life beneficiaries, having died, this accounting was had with a view to distributing the one-fifth of which she had the use, among those entitled thereto under the provisions of the will, the executors having sold securities held by them for that purpose; and they now claimed half commissions also, as trustees, on the entire capital which came into their hands as trustees, and half commissions on the one-fifth now about to be distributed.

The executors employed a clerk at a salary of \$600 a year, to aid them in the discharge of their duties.

Counsel for beneficiaries objected that the executors

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could not have commissions in their capacity of trustees ; that, as the will gave a specified sum in trust for the lives of the beneficiaries, with remainder over, they could not have commissions out of the incomes, but that they were properly chargeable to the body of the estate ; that the commissions on income could not be retained at the times of payment, but could only be recovered on an accounting and settlement before the Surrogate ; that the clerk hire was an improper charge ; and that the executors had no authority to sell the securities which had been sold for the purposes of this distribution.

S. M. MEEKER, *in person*, and for the other trustees.

M. J. O'BRIEN, for Singleton L. Crawford, and other adult grandchildren.

D. T. WALDEN, guardian *ad litem* for infant grandchild.

THE SURROGATE.—The most interesting question for consideration in this case is the amount of commissions to which the executors are entitled. The precise point involved has never been determined by the court of appeals, nor by any court whose decision I should be obliged to regard as binding authority. Hence it becomes necessary to lay down such rule of action for future guidance in such matters, in this court, as may be deduced from the history of the subject, the statutes, and the decisions relating to them.

Formerly, in England, executors, administrators and other persons, acting in a fiduciary capacity, were allowed no compensation by way of commissions, but were allowed their necessary expenses (*Perry on Trusts*, § 904); and the same rule existed in this State, down to the early part of the present century (*Green v. Winter*, 1 *Johns*.

Ch., 37; *Manning v. Manning*, *Id.*, 534); when the chancellor was authorized by the legislature to fix an allowance by way of compensation, over and above their expenses, for the services of guardians, executors and administrators, on the settlement of their accounts (*Laws* 1817, ch. 251). In the same year, the chancellor proceeded to fix such allowance at five per cent. on the first \$1,000 (that is to say, two and one-half for receiving, and two and one-half for paying out), two and one half on any excess between \$1,000 and \$5,000, and one per cent. for all above the latter sum (*Matter of Roberts*, 3 *Johns. Ch.*, 43, 630). Power to fix compensation to trustees was not conferred by the act, but subsequently the chancellor followed the same rule as to their compensation, where the instrument creating them fixed none. Thus the matter remained down to the adoption of the Revised Statutes, when the chancellor's rule, in so far as executors and administrators are concerned, was made a matter of legislative enactment (2 *R. S.*, 93, § 58). By *Laws* 1863, ch. 362, § 8, the compensation was increased to five per cent. on the first \$1,000, two and one-half per cent. on the next \$9,000, and one per cent on all sums above ten thousand. And this remains the present rate, except that each executor may, by the act of 1863, where the estate exceeds \$100,000, receive full commissions.* The fact that any pay for services was at first granted, and finally advanced to its present rate, is probably due, in part, to the increased and often complicated duties imposed upon these officers by law, and by the instruments they are appointed to execute. The duties devolved upon an executor, by law, according to the ancient authorities, were, 1st, to

* For the present law, see Code Civ. Pro., § 2736, *et seq.*

bury the deceased ; 2nd, to prove the will ; 3d, to make an inventory ; 4th, to collect the goods ; 5th, to pay the debts ; 6th, to pay legacies ; 7th, to distribute the residue (*Jacob's Law Dict.*, tit. "Executor"), and no compensation was, as has been stated, allowed him for discharging those simple duties. But as the labor, responsibility and care became greater, with the increase and general diffusion of wealth ; when testators began to clothe their executors with power to lease or sell real estate, and make the office otherwise more burdensome ; there appeared to be a necessity for granting some allowance for the services required to be performed, lest suitable persons could not be found to undertake the office. To these considerations, is probably due the legislation above recited. By Laws 1822, p. 283, § 3, incorporated in 2 *R. S.*, 109, § 57, the Surrogate was authorized to call executors to account for proceeds of real estate, ordered by the will to be sold for the payment of debts or legacies ; and by Laws 1837, ch. 460, § 75, it was provided that, where real estate was sold by virtue of an authority contained in the will, the proceeds might be distributed under the direction of the Surrogate. Notwithstanding the conferring of this additional jurisdiction upon the Surrogate, the compensation of the executors remained as fixed by the Revised Statutes, in view of all the duties they were empowered, or directed to discharge.

It is claimed that, in this case, the executors are entitled to commissions, not only as executors, but also as trustees,—in other words, double commissions. Doubtless executors, administrators, guardians and others acting in a fiduciary capacity, are, at common law, trustees ; and since executors, in view of their powers and duties

as such, have their commissions fixed, they should not be permitted to receive double the amount, unless there be some provision of law plainly awarding it. It is insisted that such a provision is found in *Laws* 1866, ch. 115. In 1850, an act (ch. 272), precisely like that of 1866, except that it did not purport to be an amendment of any existing law, and except that it contained no provision in regard to commissions, was passed. Perhaps, in order to supply these omissions, the later law was enacted. 2 *R. S.*, 94, § 66 (1st ed.), provided that "The last preceding section" (declaring the effect of a final settlement before the Surrogate) "shall not extend to any case where an executor is liable to account to a court of equity, by reason of any trust created by any last will and testament." Plainly, this implied that there were common law trusts, or powers in trust, over which Surrogates had jurisdiction, and also had in view the act of 1822 (2 *R. S.*, 109, § 57). The act of 1866, in question, reads as follows :

"Section 1. The sixty-sixth section of the third article of title third of the sixth chapter of the second part of the Revised Statutes, is hereby *amended* so as to read as follows :

"§ 66. Any trustee created by any last will and testament, or appointed by any competent authority to execute any trust created by such last will and testament, or any executor or administrator with the will annexed, authorized to execute any such trust, may, from time to time, render and finally settle his accounts before the Surrogate. . . . On all such accountings of such trustees, the Surrogate before whom such accountings may be had shall allow to the trustee or

trustees the same compensation for his or their services by way of commissions, as are allowed by law to executors and administrators, and also such allowance for expenses as shall be just and reasonable. . . .” It must be taken for granted, I think, that the object of the act of 1850 was to confer upon Surrogates powers they did not before possess, and that belonged exclusively to chancery, now the supreme court, and that that of 1866 was to authorize them to allow compensation such as the supreme court would do in such cases, and which was lacking in the act of 1850. Surely, it could not have been the design of the legislature to provide for the granting of commissions to which they were already entitled by law. It would have been a work of supererogation. I think, too, that the words “trust” and “trustee” relate exclusively to statutory trusts over which Surrogates had then no jurisdiction, and that the act in question, in so far as additional jurisdiction and the allowance of commissions are concerned, relates exclusively to those few express trusts allowed by statute (1 *R. S.*, 728, § 55; *Wright v. Trustees M. E. Ch.*, 1 *Hoff. Ch.*, 202, 215); that it has no relation to, or bearing upon a case where the same person or persons are clothed with power, as executors and so-called testamentary trustees, over the same fund, and were theretofore authorized to account concerning the same before the Surrogate. Whenever the term “testamentary trustee” is used in the new Code and elsewhere, it is only for the purpose, I take it, of distinguishing a trustee appointed by will, from one appointed by trust deed or otherwise. The word “trustee,” when employed in a statute in this connection, means solely a person author-

ized to execute one of the trusts, and possibly one of the powers in trust, permitted by the statute. Calling him a testamentary trustee only indicates the mode of his creation.

The employment, in the act referred to, of the phrase "administrator with the will annexed authorized to execute any such trust," probably sprang from the fact that it was then a mooted question, whether he could execute all the powers conferred by the will upon the deceased executor.

If, however, one person be appointed executor, and be directed, on the completion of his duties, to hand over a remaining fund to another who is to take and hold it in a fiduciary capacity, for specified purposes, then will be presented a case for double commissions, independent, however, of the statute in question. So, if the executor die, or his letters for any reason be revoked, and an administrator with the will annexed succeed him, or an administrator *de bonis non* succeed to the duties of an administrator, there will be presented cases where more than the usual statutory commissions must necessarily be allowed, also without regard to that act. But where the testator creates, by his will, one of the express trusts permitted by statute, and appoints a trustee or trustees to execute it solely, then will arise a case for an accounting, and allowance of commissions and expenses, under the statute of 1866.

Where the executors are directed, or are authorized by the will to sell real estate and hold the proceeds in trust for the purposes of the will, they act throughout as executors, and the Surrogate might, before the acts of 1850 and 1866, call them to account as such. Thus, in

Stagg v. Jackson (2 *Barb. Ch.*, 86 ; *aff'd*, 1 *N. Y.*, 206), where the testator devised and bequeathed all his estate, real and personal, to his executors as joint tenants, *in trust*, to sell the same, and until such sale to receive the rents, income and profits thereof, for the purposes of the will, and upon trust to invest, etc., and to pay certain annuities to his children until of age, then to divide the trust fund and the income into nine equal parts, to pay over three of said parts severally to each of three children, and to hold the other six parts in trust for the six remaining children ;—the chancellor held that the Surrogate had jurisdiction to take the account, the same as if the proceeds had been originally personal property (2 *R. S.*, 109, §§ 55, 57) ; that the trust to receive rents was a mere incident to the direction to convert the real estate into money for the purposes of the will, and that there was, therefore, no reason to take two accounts, one before the Surrogate, and the other in the court of chancery. To the same effect, on the first point, *Denne v. Judge* (11 *East*, 288) ; *Bogert v. Hertell* (4 *Hill*, 492) ; *Clark v. Clark* (8 *Paige*, 152) ; *Hosack v. Rogers* (9 *Id.*, 468) ; *Valentine v. Valentine* (2 *Barb. Ch.*, 430) ; all having arisen and been determined before 1850. It necessarily follows, that, in all such cases, they can now, as formerly, receive commissions in only one capacity. By settling up as executors, and then holding a fund in trust, under the will, whether done voluntarily or by decree of the court, they do not become entitled to full double commissions on the fund :—not as executors, because retaining it for another purpose is not a “paying out” such as entitles them to half commissions for that act (*Hall v. Hall*, 18 *Hun*, 358 ; *aff'd*, 78 *N. Y.*, 535) ;

nor as trustees, because they hold it merely as executors. (See *Dixon v. Homer*, 2 *Metc.*, 420.) In all these and the like cases, the trusts and the executorship are inseparable (*Valentine v. Valentine*, *supra*).

Nor can double commissions be allowed on the handing over of the fund by one executor or trustee to another (Jones' case, 4 *Sandf. Ch.*, 616; Kellogg's case, 7 *Paige*, 267; *Hosack v. Rogers*; *Valentine v. Valentine*, *supra*); but they will be allowed, where the executors are directed by the will to transfer to one of their number, as trustee, to be held by him upon a separate and distinct trust (*Valentine v. Valentine*, *supra*).

Neither can an executor or trustee be allowed full commissions on annual income received and paid over, but he will be allowed one per cent., only, where he has already had, or is entitled to have full commissions on \$10,000 (*Valentine v. Valentine*, *supra*; *Drake v. Price*, 5 *N. Y.*, 430; *Lansing v. Lansing*, 45 *Barb.*, 182); unless required, by order of the court or otherwise, to make periodical statements of his account, as was formerly provided for in the case of general guardians by the 154th Chancery Rule, and now by statute; or where annual rests are made for the purpose of compelling him to pay interest upon periodical balances, which ought to have been invested by him (*Hosack v. Rogers*, *supra*).

Should it be claimed that the act in question was intended to embrace a trustee or donee of a power in trust, as well as a trustee created under the article "of uses and trusts," it may, perhaps, be conceded, provided his duties, as donee of the power, are separable from his duties as executor; but that, I apprehend, can only be done in very rare cases. Those of *Meakings v. Crom-*

well (5 *N. Y.*, 136); *Valentine v. Valentine*; *Hall v. Hall* (*supra*); *Hood v. Hood* (85 *N. Y.*, 561), and others which might be cited, present instances of powers in trust so interwoven with executorial duties as to render a separation of them impracticable; and this case is precisely like them in this respect. In all these cases there were *legacies* to be paid, and that duty belongs to the office of executor, and may be enforced by the Surrogate. Hence, the power to sell not being separable from the duty to pay legacies, they must be regarded as executors only. Converting the realty into money and investing it to pay legacies under the will effects no change, as they still have the legacies to pay. Hence it would be erroneous to allow them commissions as trustees, when they are not clothed with that character.

It will thus be seen that I reach a different conclusion from that arrived at by the learned Surrogate of New York, in the Matter of Pirnie (1 *Tucker*, 119); *Cram v. Cram* (2 *Redf.*, 244); Matter of Carman (3 *Id.*, 46); and *Ward v. Ford* (4 *Id.*, 34). It is with considerable hesitation, and after a careful consideration of the whole subject, that I am led to differ from gentlemen so learned and so devoted to a conscientious and intelligent discharge of their duties. The failure of the court of appeals, in *Hall v. Hall* (*supra*), to indorse the doctrine of those cases, induced an investigation of the point. The conclusions I have reached are:

1. That the acts of 1850 and 1866 affect only cases of express trusts, and possibly powers in trust, authorized by statute, and have no bearing upon the question of commissions where the offices of executors and so-called testamentary trustees are inseparably united in

the same persons ; and that, where such is the case, single commissions only can be allowed.

2. That double commissions are not allowable on the transfer of the estate from one executor or trustee to another, unless such other is directed by the will to take and hold it upon a separate and distinct trust ; and that a mere closing up of their duties as executors, and retaining the fund for beneficiaries, under the will, does not operate such transfer.

3. That an executor, clothed with a power in trust, cannot be allowed full commissions on annual income received and paid over, but will be allowed one per cent. only where he has already had, or is entitled to have, full commissions on \$10,000 ; except in the single and rare instance where, on an accounting, annual rests are made, for the purpose of compelling him to pay interest upon periodical balances which ought to have been invested by him.

4. That when executors, who are directed by the will to hold a fund in trust, render their account as executors and retain such fund, they can have full commissions then, and will only be entitled to one per cent. on the income thereafter received and paid over, where they have already had commissions on \$10,000 or over.

The allowance of commissions in this case will be based upon the views above expressed. If the executors, as is claimed, took half commissions, at once, on receiving the funds of the estate, on entering upon the discharge of their duties, they did what they were not authorized to do ; but I suppose that the parties, having been all cited, are concluded by the accounting of 1877.

The objection to the charging of commissions on the

incomes paid over, I do not consider well taken, for the reason that the will does not give the income of any specific sum to any of the life beneficiaries. The amounts to produce the incomes were uncertain.

The executors (three of them as I make it), each retained one per cent. on the income received and paid out. As the estate far exceeded \$100,000, I think they were right in doing so, and did not thus violate the general rule, that executors have no authority to appropriate sums to their own use, as commissions, until they are allowed by the Surrogate on the settlement of their accounts. That rule would have been applicable to the accounting of 1877.

Considering the unusual magnitude of the estate, and the nature of the numerous securities in which it was chiefly invested, I think the employment of a clerk, at the moderate salary paid, was calculated to be beneficial, and the amount paid is allowed as a reasonable charge.

Notwithstanding the provisions of the will, to the effect that no securities should be sold, still I think such a sale was intended, else how could the distribution now contemplated by its provisions be effected? Allowances out of the fund will be made on the usual affidavits.

Subsequently to delivering the foregoing opinion, the Surrogate said :

Ordinarily, courts examine and consider only the cases and statutes cited by astute and contending able counsel. That this is not always an entirely safe course for the court to pursue is exemplified in this case. After the preparation of the foregoing opinion, it has been discovered that the act of 1866, ch. 115, has been repealed,

leaving the act of 1850 still in force.* It is not easy to keep a careful reckoning of the kaleidescopic changes in the statute law, if the eye be withdrawn for only an instant from the steadily-revolving cylinder. The act of 1866 was the only law by which the Surrogate was authorized to allow commissions to testamentary trustees. That having been repealed as stated, there is no provision for their allowance other than may be found in the Code. Section 2811 makes several prior sections applicable to the case of the accounting of a testamentary trustee, none of which seem to, in any way, affect the question, except section 2736,—which provides that “where the value of the personal estate of the decedent amounts to one hundred thousand dollars, or more, over all his debts, each executor or administrator is entitled to the full compensation allowed by law to a sole executor or administrator, unless there are more than three; in which case, the compensation, to which the three would be entitled, must be equally divided among them.”

While the fact of the repeal and this recent enactment do not have any particular effect upon the result reached in the opinion, as the personal estate far exceeded \$100,000, yet it seems to leave the subject of commissions to such trustees wholly unprovided for, except in the single case mentioned in the section; and it in no way affects the conclusion that an executor and trustee, whose functions are not separable, cannot have commissions in both capacities.

* It would seem that L. 1880, ch. 245, § 1, subd. 2, (8), and *Id.*, § 2, repealed 2 R. S., 94, § 66, and, with it, the acts of 1850 and 1866.—RER.

MATTER OF CLARK.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—February, 1882.

MATTER OF CLARK.

In the matter of the estate of MARY CLARK, deceased.

The testatrix, who died in 1864, by her will, after disposing of her personal estate, devised her real estate to her executors, in trust to sell the same, pay one-half the proceeds in manner directed, and hold the other half for the benefit of A. and B., two grandchildren, and to make advances therefrom as necessary and expedient, for their education and maintenance. D., the qualifying executor, sold the real estate, paid one-half the proceeds, retained the other half, and died intestate in 1878, never having filed an inventory or rendered an account, or paid any sum to A. or B. On an application by A., under Code Civ. Pro., § 2818, for the appointment of a successor to D., as a testamentary trustee,

Held, that D. was not a testamentary trustee within the meaning of Code Civ. Pro., § 2514, subd. 6,—the trust not being “separable from his functions as executor;” that the trust fund, derived from the conversion of the real estate, constituted legal assets, for which D. was accountable only as executor; and that the Surrogate’s court had no authority to appoint a trustee as his successor, but that an administrator with the will annexed would succeed to all his powers and duties, and might be appointed upon a proper petition.

Subdivision 6 of section 2514 of the Code of Civil Procedure,—construed. *Bain v. Matteson*. 54 N. Y., 603, and *Dunning v. Ocean Nat. Bank*. 61 Id., 497, limiting the powers of an administrator with the will annexed,—explained.

MARY CLARK, the testatrix, died in 1864, and her will was proved the same year. After disposing of her personal estate, she proceeded to dispose of her real estate, consisting of a house and lot in New Rochelle, as follows: “I give and devise my house and all my lands and real estate, situate in the town of New Rochelle aforesaid, unto my executors hereinafter named, upon the following trusts, that is to say; they, my said executors, shall, as soon as may be, after my decease, sell and dis-

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pose of my said house and real estate, either at public or private sale, as they may deem best, and convert the same into money, and out of the proceeds arising from such sale or sales, they shall pay off and discharge a mortgage upon said lands, now held by my said daughter Martha J. A. Seacord, for the sum of six hundred dollars, together with the interest then due thereon, and shall also pay all my just debts and funeral expenses. They shall then pay unto my said daughter one-half of the balance of money remaining in their hands as the proceeds of such sale or sales as aforesaid, for her share or interest in my said real estate; the other half of such balance of money, part of the proceeds of such sale or sales, they, my said executors, shall hold in trust, for the benefit and behoof of my grandchildren, Charles H. and George Clark, children of my son Moses S. Clark, and shall, from time to time make such advances, from such money, as may be necessary or expedient for the education and maintenance of my said grandchildren."

John A. Deveau, named as one of the executors, was the only one who qualified and took upon himself the burden of the execution of the will. Within a year after the death of the testatrix, he sold the real estate for about \$2,500, and, after paying the debts, funeral expenses and the mortgage to Mrs. Seacord, there remained in his hands, of the purchase money, about \$1,600, one-half of which he paid to Mrs. Seacord, as directed by the will, and retained the other half. Deveau died intestate in 1876, having never filed an inventory, nor rendered an account, as such executor.

George Clark, one of the grandchildren named in the will, now presented a petition, alleging the above facts,

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and also showing that he and his brother Charles were minors, at the time of the death of the testatrix, and that they had recently become of age; that the executor never advanced or paid to petitioner or his brother any interest upon, or any part of the principal of said fund, which fund amounted to \$800. And he prayed that some suitable person might be appointed trustee of the fund, in place of said Deveau.

JOHN W. BOOTHBY, *for petitioner.*

THE SURROGATE.—This court is asked, on the facts alleged, to appoint a trustee, by virtue of the power conferred by section 2818 of the Code. A “testamentary trustee” is defined by section 2514, subdivision 6, of that instrument, to be “every person except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.” Did Mr. Deveau become, within this definition, a testamentary trustee? The subdivision, it would seem, simply enacted, in substance, what had long since been declared to be the law, by the courts, and hence, it is immaterial to inquire whether the provisions of the Code, in this respect, are applicable to the will in this case.

The question as to when and how the duties of trustee are “separable” from those of executor is not so easy of solution, as that of when and how they are not separable. Instances of the latter may be found in *Valentine v. Valentine* (2 Barb. Ch., 430); *Stagg v. Jackson*

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(2 *Id.*, 86; S. C., 1 *N. Y.*, 206); *Clark v. Clark* (8 *Paige*, 152); and *Hood v. Hood* (85 *N. Y.*, 561). In this last case, the testator, after providing for the payment of some general legacies, devised and bequeathed the residue of his estate, real and personal, to his executors, in trust, to sell the real estate, and collect and realize the personal estate, to divide the proceeds into shares, and invest for the benefit of his widow and children. One of the executors, being a resident of the State of New Jersey, gave a bond with sureties for the faithful discharge of his duties, as required by law. In an action on the bond, to recover moneys alleged to have been wasted by the executor, the sureties sought to escape liability on the ground that the *devastavit* was committed by him when acting as trustee, while they were sureties for him as executor, only. The court of appeals, following *Stagg v. Jackson* and other cases, held that, under the will, the whole estate, under the doctrine of equitable conversion, was legal assets, and hence the liability of the sureties continued throughout, as he was accountable only as executor. In all such cases, although a trust, or power in trust, is created, the trustee, or donee of the power, acts, and is liable for the fund, only in his capacity as executor.

I am not aware of any case illustrating the "separable" character of the duties of executor and trustee. In *Stagg v. Jackson*, an allusion to such a separation was made. There, the executors were clothed with power to sell the real estate, and to convert the whole into a money fund, and, in the meantime, to collect and receive the rents, and apply them. It was held that the trust to receive the rents, and apply them, was a mere incident to the power to sell and convert, and that, there-

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fore, there was no necessity for two accountings, one in equity for the rents, and the other before the Surrogate for the other portions of the estate. We can, from the hint thus furnished, suppose a case where the two offices are separable. For instance, a testator, possessed of a large personal estate and seized of several parcels of real estate, might direct the conversion of all, save one parcel of the realty, into personalty, so that it should become legal assets; and, as to that parcel, create a trust in the executor to receive the rents and profits, and apply them, under subdivision 3 of section 55 of the article on Uses and Trusts. In such a case, as the law formerly stood, he could have rendered his account, as to the legal assets, to the Surrogate, and as to the rents, issues and profits, to the Chancellor only. Hence, in such a case, the offices are separable. Other instances might be supposed, but that will suffice as an illustration.

But if a trustee cannot be appointed in this case, can an administrator with the will annexed be substituted in place of the deceased executor?

It seems to me a very nice distinction to hold, as the higher courts do, that the office of trustee is a matter of *fidei commissa*, a personal trust, while that of executor is not; that, in the case of a testamentary trustee, an administrator with the will annexed cannot execute the will, while in that of an executor he can. It is difficult to perceive how the duties of the one pertain solely to the *person*, and of the other to the *office*. Both act in a fiduciary capacity. It is true, that the former is generally clothed with power to dispose of or manage real estate, and the latter deals with personalty; yet, as has been seen, where the will directs a sale of the realty, it

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becomes legal assets, and loses its higher character of land. If, therefore, as was held in the cases of *Bain v. Matteson* (54 *N. Y.*, 663), and *Dunning v. Ocean National Bank* (61 *N. Y.*, 497), an administrator with the will annexed cannot execute the trusts contained in the will, the doctrine, I think, should be confined and applied only to cases like those, where the trustee never entered upon his duties, and not to those where he has, in fact, converted it into money. After such actual conversion, an executor, equally with a trustee, could apply it to the payment of legacies ; and hence, I can perceive no good reason why an administrator *cum testamento annexo* could not, under the statute, have the same power ; *and especially where the trust duty is annexed to the office of executor, and is not separable therefrom.* This is such a case. The will, after giving certain legacies, directs a sale of the real estate, for the purposes stated, and thus operates an equitable conversion of it into money, and the trust duty was annexed to that of executor ; and Mr. Deveau must be regarded as having been such only.

On a proper petition being presented, an administrator with the will annexed may be appointed. This application must, accordingly, be dismissed.

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—March, 1882.

BOULLE v. TOMPKINS.

In the matter of the estate of WILLIAM LONGSTAFF, deceased.

The testator, who died in 1877, leaving real and personal estate, by his will (1) gave all to his wife for life, with remainders over to his children and grandchildren; (2) directed his executors to carry on his business as a tinsmith, etc., for the benefit of his wife during her life, with power to dispose of the stock in trade for her benefit; and (3) gave his store, shop, tools, fixtures, and stock in trade, after her death, to a grandson. Testator left business book accounts, due him, of over \$13,000, of which the executor collected about half, and mostly invested the same, paying to the widow interest on the investments, and profits of the continued business. At her death in 1881, the aggregate amount invested in the business was found to be \$1,300, of which \$1,100 was cash derived from the book accounts, and \$200 was due for goods purchased. On the executor's accounting, it was contended by the legatees that this loss of \$1,100 should fall, not upon them, but upon the executor personally. *Held,*

1. That, under the circumstances, the testator must be held to have intended the sums collectible on those accounts to be used, so far as necessary, to carry on his business, it not being feasible to continue the same successfully, without any cash capital; and that the executor, having been guilty of no breach of trust, was entitled to reimburse himself for the loss of \$1,100 out of the fund employed in the business at the testator's death.
2. That the debt of \$200 stood upon the same footing, it being impossible for him to speculate as to the time, and cease business in anticipation, of the death of the tenant for life.

THIS was a hearing of objections upon the judicial settlement of the account of Edward M. Tompkins, executor, etc., of decedent.

The testator, in his lifetime, was engaged in the business of a tinsmith and stove-dealer, in the village of New Rochelle. He died in 1877, seized of several par-

cels of real estate, and possessed of considerable personal property, the use of the whole of which he gave, by his will, to his wife, with remainder over to his children and grandchildren. Among other provisions, he devised to his grandson, Myron E. Boyd, to take effect at the death of the widow, the lot with the buildings thereon, owned and used by him as a store and workshop for carrying on his business. He then provided :

“*Sixth.* I direct my executor to carry on my business as a tinsmith and stove-dealer, for the benefit of my wife, Hannah Longstaff, as long as she lives ; also giving him full power to dispose of the stock in trade of said store, if he deem it necessary for her benefit during her lifetime ; and at her decease, I give the business of said store, and all the working tools and fixtures used by me as a tinsmith and stove-dealer in said store, and all the stock in trade remaining in the store after my wife’s decease, to the aforesaid Myron E. Boyd.”

At the time of testator’s death, there were book accounts against customers, growing out of the trade, to the amount of over \$13,000, of which about \$7,000 was subsequently collected by the executor. During the life of the widow, who died in 1881, the executor paid her interest on the collected book accounts, which were chiefly invested by him, and more or less of estimated profits of the business ; but whether she was paid more or less than the actual profits did not distinctly appear. After her death, however, it was found that the amount, in the aggregate, invested in the business, was \$1,339.79, of which \$1,113.56 was cash derived from the book accounts, and \$226.23 was due for goods theretofore purchased. On the executor’s accounting, the legatees

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objected that he had no authority to use the proceeds of the book accounts, to carry on the business.

MARTIN J. KEOGH and J. W. BOOTHBY, *for executor.*

C. E. KENE and ROOSEVELT & BANKS, *for Henry E. Boulle.*

THE SURROGATE.—It is a little remarkable that no case like this can be found in the reports in England or this country, which determines the question here presented. There are numerous cases, however, between creditors and the executors, where the will authorized the carrying on of the trade of the deceased after his death. Such were the cases of *Exp. Garland* (10 *Vesey*, 119); *Exp. Richardson* (3 *Maddock*, 138); *Thompson v. Andrews* (1 *M. & K.*, 116); *Cutbush v. Cutbush* (1 *Bear.*, 184); *Sherman v. Robinson* (43 *Law Times*, 372); *Owen v. Delamere* (*Law Rep.* 15 *Equity*, 134); *Fairland v. Percy* (3 *Law Rep. P. & D.*, 217); *McNeillie v. Acton* (4 *De Gex, M. & G.*, 744), decided by the English courts; and *Burwell v. Mandeville's Executor* (2 *How. U. S.*, 560), and *Ferry v. Laible* (31 *N. J. Eq.*, 566; *S. C.* on appeal, 32 *Id.*, 791), determined by American courts. In all these cases, the question considered and determined was what property of the estate the creditor of the continued trade could resort to, for the recovery of his debt; and it was generally held, and such seems to be the current of authority, that while the executor was personally liable for the debts, the creditors, if necessary to secure themselves, had a remedy against the goods employed in the trade, and also against the fund or assets authorized to be used in the trade, but not against the other assets and property of the estate. Hence, the

dicta of the learned judges in those cases must be read in the light of the facts before them. It is undoubtedly a well established principle, both at the common law and under our statute, that an executor shall gain nothing by the increase of the estate through his efforts, nor lose anything by its diminution without his fault. Here, I think, the whole question hinges upon the proper application of this principle. It does not arise between him and a creditor of the trade, but between him and the legatees under the will; and in this lies the novelty of the question. True, this difference may be of little moment, so far as the solution of the difficulty may be concerned, for the rights of creditors and legatees may be regarded as upon substantially the same footing.

In *McNeillie v. Acton* (*supra*), Lord Justice TURNER, said, "Looking at the language of this will, containing, as it does, merely a direction to continue the trade, without any specific direction as to the assets which are to be employed in it, I am satisfied that it was not the meaning of the testator that any portion of his assets *beyond that which was employed in the trade at the time of his death*, should be considered as *the fund* for carrying it on after his death." This is the doctrine laid down in most of the cases, but none of them define what are *assets* so employed which constitute such *fund*. None of them discuss the question, whether the debts, or book accounts due the testator on account of the business at the time of his death, constitute a part of such assets or fund. In *Exp. Richardson* (*supra*), however, where the testator was member of a partnership, which by its articles, had several years to continue when he died, and which provided that, in case of the death of either partner, he

should appoint, by will or otherwise, a successor ; and the testator did by will appoint his wife and others, his executors, his successors, to carry on the business, which was that of timber merchants in Liverpool, the executors refused to act, but the widow qualified, and with the surviving partner carried on the business until the firm became bankrupt ; the question was whether the estate *outside of what the testator had employed in the business* was liable to creditors of the firm, so constituted, and the court held that all that was meant to be left to carry on the trade, was *the capital of the trade*, and that the executrix was not authorized to employ one shilling of the assets beyond *the capital*. Undoubtedly, the debts due the firm, in whatever form, the cash and stock of timber, etc., on hand at the testator's death, were a part of the capital, as was also the testator's share of the net earnings. Had there been no such arrangement to continue the business, all the testator's interests in the copartnership would have been, at his death, assets belonging to his estate, subject, of course, to the rights of the surviving partner, and the creditors of the firm, if any.

In *Exp. Garland*, it was held that where the will directed a limited sum, beside the property actually employed in the business at the testator's death, to be paid by the executors for the purpose of carrying on his trade (he being a sole trader), the general assets, beyond that *fund*, were not liable. So in *Burwell v. Mandeville's Executor* (*supra*), Judge STORY decided that where the will directed that the testator's interest in a copartnership should be continued therein until the expiration of the term limited by the articles, the remedy of the

creditors was limited to *the funds embarked in that trade.*

The ordinary meaning of the word *fund*, according to Webster, is "a stock or capital; a sum of money appropriated as the foundation of some commercial or other operation, undertaken with a view to profit, and by means of which expenses and credit are supported; and hence the word is applied to the money which an individual may possess, or the means he can employ for carrying on any enterprise or operation. No prudent man undertakes an expensive business without funds." Now, what was the intention of the testator in this regard, as ascertained from the will and the surrounding circumstances. He directed this trade to be carried on for *the benefit* of his widow. It was a business in which he had given credit largely, as there were book accounts due to him, growing out of the trade, to the large amount of nearly \$14,000. The trade could not, therefore, be advantageously carried on so that the widow should derive a benefit from it, without a cash capital. So much of the book accounts as were collectible, if available for that purpose, would constitute such cash capital; and would undoubtedly have been necessarily used by the testator, had he lived, to carry on his business successfully. These credits, in the shape of book accounts due to the trade, were, therefore, I think, intended by the testator to be used, so far as necessary, for the carrying on of the business. Besides this, it was evidently his intention, that at the death of his widow, his grandson, Myron E. Boyd, should at once step into a business in successful operation. This could hardly have been accomplished, had there been an attempt to carry it on without any cash

capital whatever. His intention that his grandson should continue the business of his life, is further manifested by his devising to him the lot, store and workshop where he had carried on the trade. I am, therefore, of opinion that the executor had a right to employ the avails of the book accounts, so far as necessary, to carry on the trade as directed by the will, as they were set apart by the testator for that purpose, not only as being a part of the fund used by him in that trade, but also because of his intention to that effect, as derived from other provisions of the will to which allusion has been made.

This provision of the will, resulting as it did in a loss, does not seem to have been a very wise one; but, as Vice-Chancellor SHADWELL once remarked, "Every testator, by the law of the land, is at liberty to adopt his own nonsense in disposing of his property." It is claimed that this loss, amounting to about \$1,100, should not fall upon the legatees, but upon the executor personally. This view would be just, provided the executor had been guilty of a breach of his trust, but, as I have endeavored to show, he was simply, and in good faith, obeying the directions given to him by the will. True, he might have refused to qualify, and thus saved himself from vexation and trouble, ill compensated by his commissions. But he did undertake the duties of the office, and, for aught that appears, discharged them faithfully. In *Ferry v. Laible* (32 *N. J. Eq.*, 791), the court says, "for what they do in obedience to their trust the executors are entitled, in equity, to be indemnified out of the property lawfully embarked in the business." This seems to be just and reasonable; and, adopting this principle, the executor may be reimbursed out of the

fund employed in the business at the time of the testator's death. There was collected of the book accounts resulting from the trade about \$7,000, thus presenting ample means to indemnify him.

It seems to me, too, that the debt of \$226.23, incurred by the executor in carrying on the trade, which was outstanding at the death of the widow, and paid by him, stands upon the same footing as the preceding item. It accrued during the life-time of the widow, and immediately upon her death, all of the stock in trade, tools, etc., by the terms of the will, became Boyd's. The executor could not speculate as to the time of the death of the widow, fix a certain time for her to die, and cease to carry on the trade in anticipation of the event happening at that time, but was obliged to continue it down to the time of its actual occurrence.

The widow should have been paid the profits of the business annually, if there were any, and then, when there were none for any particular year, or the business was conducted at a loss, of course she was entitled to nothing. The account of proceedings filed is not very clear on the subject, but this theory will account for her having been rightfully paid some profits, when there was, on the whole, a loss.

A decree should be entered in accordance with these views, and, as the question is a novel one, costs are allowed to the executor, with a suitable allowance to both parties, based upon the usual affidavits.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—March and April, 1882.

CHALKER v. CHALKER.

In the matter of the estate of MARTHA B. CHALKER, deceased.

The testatrix was stricken with paralysis March 1, and died May 3, 1879, leaving a small estate of about \$1,200, of which the sum of \$1,125 was in savings bank. By her will, executed March 19, 1879, she bequeathed this sum in equal shares to her two sons, one of whom she appointed her executor. The latter had the chief care of her during the illness, and she died at his house. On his accounting, the executor omitted to charge himself with the \$1,125, claiming it as a gift *inter vivos*, from his mother. He testified that, on April 10, 1879, she proposed to give him the deposit, and signed an order on the bank, which was witnessed by her attending physician; that he drew the money and delivered it to her, whereupon she handed it again to him, requesting him to make good use of it, pay some debts, etc. The physician was not called. Objections to the account being filed,—

Held, that, in view of the relationship between decedent and the alleged donee, the burden of proof lay upon him to establish the fairness and propriety of the gift; that it was impossible to discover the mind and motives of decedent; that the circumstances of her illness, the unexplained annulment of her recent natural testamentary disposition, and the advantage of situation of the claimant, who alone testified to the transaction, led to the conclusion that the gift did not proceed from her own free will; and that the executor must account for the sum in dispute, as part of the estate.

The sum of \$40, for a burial plot, is a reasonable disbursement, as a part of the funeral expenses, where decedent's personal estate is \$1,200.

Under Code Civ. Pro., § 2557, prohibiting the allowance of costs, by the Surrogate, other than expenses, out of an estate or fund less than \$1,000 in amount or value, the amount of an estate is not the balance left after payment of funeral expenses, debts and expenses of administration, but the gross amount thereof, at the time of the owner's death, with any increase up to the time of accounting.

HEARING of objections on the judicial settlement of

the account of Sumner Chalker, executor, etc., of decedent.

The testatrix was seized with her last illness about March 1, 1879, made her will on the 19th of the same month, and died on May 3rd, following. The bulk of her small estate consisted of \$1,125, of which \$1,000 was in a savings bank at Portchester, Westchester county, and \$125 in a savings bank at Hartford, Conn. When attacked with her illness, which was paralysis, she was boarding at East Portchester, in Connecticut, where she remained until a few days before her death. Her son, Sumner Chalker, who resided in New Rochelle, had the chief care of her during her sickness; he gave instructions for the preparation of her will, of which he was made executor, and which, among other things, bequeathed the \$1,125, after the payment of her debts and funeral expenses, equally to him and his brother Homer, her only sons; but the latter share was to be held in trust for Homer's life, with remainder over to Homer's children. The executor did not, on his accounting, charge himself with this sum, claiming that his mother gave it to him about the 10th day of April preceding her death. His statement, on being examined by the contestant Homer Chalker, was that she proposed to give him the money; that she signed an order on the savings bank directing the payment of the money to him, which was witnessed by her attending physician; that he went to the bank, drew the money, carried and handed it to her, who handed it back to him without counting it, and said she gave it to him, requesting him to make good use of it, pay some debts, etc. The physician was not called to testify.

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Some questions, other than that of the validity of this gift, were raised, which are disposed of in the opinion.

BANKS & ROOSEVELT, *for executor.*

ARTHUR T. HOFFMAN, *for objector.*

THE SURROGATE.—The chief question for consideration is the validity of the gift, the evidence showing the capacity of the testatrix to transact business understandingly, to be very doubtful.

When it is established that a relationship exists, such as principal and agent, attorney and client, parent and child, between the donor and donee, then, before the validity of the gift will be upheld, it must be made to appear that the transaction was unaffected by fraud of any description whatever, either actual or constructive. The burden of proof rests on the donee, to establish its perfect fairness and propriety. And it is the duty of the court to search the evidence carefully, and be vigilant to ascertain the real nature and character of the transaction, and to learn the mind and motives of the giver. If such proof cannot be given, then the case will be treated as one of constructive fraud, and the gift set aside (*Decker v. Waterman*, 67 *Barb.*, 480).

Now, considering that the alleged donor had, shortly before the date of the alleged gift, been stricken with paralysis, by which her body and mind were shattered; that she had then executed a will which she was deemed competent to execute only because it was in accordance with the laws of natural affection and justice, by which she had given the bulk of her small property equally to her two sons, one of whom was to hold the share of the

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other in trust, for sufficient reasons ; and considering that, shortly thereafter, this alleged gift was made by her, by which the will was materially changed and almost rendered nugatory, without any reference being made by her to that will, it seems to me that the transaction cannot be sustained as a valid gift. It is impossible to learn the real mind and motives of the deceased. It may well be that she intended, provided she had mind and memory sufficient to form an intelligent intention, to place the money, or what should remain of it after paying her debts and funeral expenses, in the hands of Sumner Chalker, for himself and brother, thus adeeming the legacies, and so far superseding the provisions of the will. Sumner was in almost constant attendance upon his mother during her illness of about seven weeks, from about March 1st to May 3d, when she died, and in a position affording him every facility to take advantage of her mental and physical weakness. She was seized with the disease of which she died on March 1st; the will was executed on the 19th of the same month; the alleged gift made April 10th, and she died May 3d. The alleged donee is the only witness who testifies to the transaction. Of course, he has a vital interest in having it pronounced valid. While our statute renders him competent as a witness for the contestant, it leaves his testimony open to such criticism and suspicion as are always engendered by the fact of an existing pecuniary interest. In the case of *Griffiths v. Robins* (3 *Madd.*, 191), it was held that, to maintain a gift under such circumstances as appear in this case, it must be established, by the intervention of a third person, that the gift proceeded from the free will of the donor, and was fully

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understood by her. In *Goddard v. Carlisle* (9 *Price*, 169), the court laid down the same doctrine. These cases are cited approvingly in *Nesbit v. Lockman* (34 *N. Y.*, 167). *Sears v. Shafer* (6 *N. Y.*, 268) is also a strong authority on the point under consideration.

The alleged gift must, therefore, be regarded as invalid, and the executor be required to account for the money he so obtained from the deceased, but as he paid some debts of hers, after he received it and before she died, those items should be allowed to him. None of them are objected to, except the item of \$8 paid for house-keeping. As the objection taken to his testimony as to transactions and communications between him and the deceased is sustained, there is no evidence to prove the item, and it is, therefore, disallowed. The item of \$40 for a burial plot, being a part of the funeral expenses, and, under the circumstances, reasonable, is allowed.

As to the item of \$168, being a claim of the executor for services rendered by him to her during her last sickness, I exclude all of the executor's testimony on the subject as incompetent, and must, therefore, look elsewhere for evidence on the subject. It appears, then, from the testimony of his sister, that, after the first week of the illness of the testatrix, the executor and his wife were in attendance upon her, they residing at New Rochelle and she being at East Portchester in Connecticut, about fifteen miles distant; that she was removed to their house in New Rochelle some four or five days before her death, where, the presumption is, they cared for her. It otherwise appears that the executor was active in procuring the making of the will, and in other ways busied himself in her affairs. On the whole, I

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do not consider his bill an unreasonable one, and it is accordingly allowed. Costs are allowed to contestant.

Decreed accordingly.

Subsequently to the entry of the decree, in accordance with the above opinion, a motion was made to open the same, so far as to permit a reconsideration of the question of allowance of costs, it being claimed by the executor that the amount and value of the estate was less than \$1,000. The inventory filed showed the amount of the estate, which was wholly personal property, to be only \$303.42, but it was found (above) that it should be increased by the sum of \$1,125, being the amount of an alleged gift, held to be invalid, and out of which the executor had paid some of testatrix's debts to the amount of \$242. It also appeared that the sum of \$187.16 embraced in the inventory was the amount of claims which could not be collected. The executor was charged with \$45, for interest on the amount of the alleged gift, which was treated as increase.

C. H. ROOSEVELT, *for the motion.*

A. T. HOFFMAN, *opposed.*

THE SURROGATE.—By section 2557 of the Code, it is provided that "costs, other than actual expenses, cannot be awarded to be paid out of an estate or fund, which is less than one thousand dollars, in amount or value." The sole question is,—did or did not the amount of the estate of the deceased exceed \$1,000? At the time of settling the decree, it was decided that it did, and I see no good reason to hold otherwise now. The amount of the estate at the time of the death of the owner, with,

perhaps, any increase thereon up to the time of the accounting, must determine as to the power of the court to exercise the discretion with which it is clothed, as to granting or withholding costs.

The estate of a decedent consists of all of his possessions at the time of death, and it is such estate which must be administered ; which administration consists in the payment of funeral expenses, expenses of administration, debts and legacies, or distributive shares. As to the personal estate, the inventory usually fixes the amount in the first instance, but it may be corrected by showing that articles were embraced in it which did not belong to the deceased, that others were not worth the appraised value, and that still others were worthless ; as debts which were not collectible. Besides, items may be added which should have been embraced in it. When such corrections have been made, the value and amount of the estate is ascertained ; but if there has been any increase, I am inclined to think the amount of it should be added. Thus, the figures resulting inform the court whether it can exercise its discretion in regard to granting costs. That funeral expenses, debts and expenses of administration have been paid out of the amount of the estate, can make no difference. The question of costs is determined, not by the amount of the balance of the estate after such payments, but by the gross amount thereof.

In this case, the inventory filed disclosed the amount of the estate to be \$303.42, but the testimony showed that an item of \$1,125, claimed to have been given away by the deceased in her life-time, and which was found not to have been a valid gift, had not been placed upon the inventory, and belonged to her estate. This made

the whole amount, \$1,428.42, but it also appeared that of the items on the inventory \$187.16 was uncollectible, thus reducing the amount of the estate to \$1,241.26, without taking into consideration the sum of about \$45 of increase, which would make it \$1,286.26. The court therefore had power to award costs.

It is claimed, however, that the sums paid out of the \$1,125, by Sumner Chalker, in satisfaction of claims against the deceased, during her life-time, to the amount of \$242, should not be regarded as any part of the estate, and that thus the amount thereof, without including the amount of the increase, would be less than \$1,000. Assuming that this sum was, in various items, paid by him prior to her death, about which there seems to be some question, yet as the alleged gift, by virtue of which he held the money, was declared void as such, he had no right to use it for any purpose; and any such payments made by him must be treated as advancements made for the deceased, and thus constitute claims against her estate. Indeed, he presented a verified claim to this court, embracing these payments, in which he alleged they were "for cash advanced by him for her account." But, conceding that the \$242 should be deducted, there still remains \$1,044.26 as the amount of the estate.

It is also asked that the decree be opened in order to enable the executor to show that, instead of \$1,125, the amount of the alleged gift was only \$1,114, and that, therefore, the executor is charged with \$11 too much. The figures which he now seeks to reduce were taken from his own evidence, and if he there made a mistake, I can see no propriety in opening the case, to litigate as to that small sum, at a probable expense of more than

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twice the amount. The motion must be denied. As the question is novel, costs are not granted to either party.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
February, 1882.

BECKER v. BOCHUS.

*In the matter of the probate of the will of HENRY SITTING,
deceased.*

The intent of the final sentence of Code Civ. Pro., § 2648,—excluding, from the one year's limitation of proceedings to revoke probate of a will, an application to vacate, etc., a decree pursuant to section 2481, subd. 6,—is to soften the rigor of the remainder of the first-named section by extending the Surrogate's general power of setting aside, etc., to decrees of probate after a year from their rendition. After the year, the application is in the Surrogate's discretion.

Accordingly, where a petition for revocation of a probate decree rendered in 1873 was presented after the lapse of more than seven years, by a daughter of testator, who, though then an infant, was not represented by guardian on the probate, she claiming that, by reason of the provisions of the Code mentioned, her time to apply was unlimited,—it appearing that she became of age in 1874:—

Held, that her absolute right to contest the probate ceased at the end of a year after the decree was rendered; that she had been guilty of laches by delay; and that the application should be denied.

THIS was a petition by Marguerite Becker, a daughter of decedent, praying for the revocation of probate of his will, and that Martin Bochus and Anton Schneler, the executors, and others, be cited to show cause, etc. The facts appear sufficiently in the opinion.

THOMAS STEVENSON, *for petitioner.*

JOHN C. CLEGG, *for executors.*

WILLIAM SETTLE, *special guardian for infants.*

THE SURROGATE.—Henry Sittig died in 1873. He left several children, all minors, among whom was his daughter Marguerite, the petitioner. The will was admitted to probate two weeks after decedent's death.

The petition for proof of the will was made by the widow, and erroneously alleged that Marguerite was of age at the time of her father's death. Accordingly, she was not represented by any guardian, general or special. She became of age at some time during the following year, and, in the year 1875, successfully prosecuted, in the superior court of this city, an action against the executors of her father's estate, for money lent him in his life-time. She now seeks, after the lapse of seven years, to procure a revocation of the probate, on the ground of undue influence, coercion, fraud and non-compliance with the legal formalities of execution.

It is claimed, in opposition to this application, that the petitioner is bound by the provisions of section 2648 of the Code. That section provides that such a petition as the one under consideration "must be presented within one year after the recording of the decree admitting the will to probate, except that, when the person entitled to present it is then under a disability specified in section 396 of this act, the time of such disability is not part of the year limited in this section, *unless such person shall have appeared by general or special guardian or otherwise on such probate.*" Infancy is one of the disabilities mentioned in section 396. It would appear, therefore, from the words just quoted, that the time long since elapsed, within which this petitioner could apply to this court for revocation of probate.

But it is claimed, in her behalf, that, by the con-

cluding sentence of section 2648, the portion of that section already quoted is made utterly nugatory, and that the petitioner's status is precisely the same as if she had made her application in 1876. If this is a correct construction of the words in question, the section as a whole is simply absurd. But is it? The words relied upon by the petitioner are the following: "But this section does not affect an application made pursuant to subdivision 6 of section 2481 of this act." That subdivision reads as follows: "A Surrogate, in court or out of court, as the case requires, *has power* . . . to open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of this court."

It seems to me very evident that, by this language, the legislature simply meant to say that, from the general power of setting aside decrees, which was accorded to Surrogates by section 2481, the power to revoke probate of a will was not excluded, even though more than a year might have elapsed since the admission of such will to probate. But a grant of power is by no means identical or necessarily coincident with a requirement for its exercise. I think that the manifest design of the legislature was to permit the Surrogate to exercise his discretion, in entertaining or denying such application for a revocation as would be absolutely barred if the statute of limitations were to be strictly enforced. In other words, the design of the latter portion of the section in question was to soften, in its application to proper cases, the rigor of the earlier portion.

If this construction of the statute is correct, the question which next arises is, whether there is anything in the particular circumstances of this case, to justify me in

granting the prayer of this petition. I do not think that there is. It is unnecessary to decide whether the petitioner is estopped by her dealing with the executors as such, in the suit which she brought against them upon coming of age. But the facts, that that suit was brought, and that seven years have since elapsed, are controlling ones in leading me to deny her application. If she had any equitable rights, she has slept on them too long to wake up and claim them now.

It has been urged, in her behalf, that, by reason of her infancy at the time the will was proved, and her non-representation by guardian, the court had no jurisdiction to admit the will to probate. I think otherwise. And so did the legislature which enacted the section under discussion, as will appear by reference to the words first italicised in the opinion. The phrase, "unless such person shall have appeared by general or special guardian or otherwise on such probate" is meaningless upon any other theory. That language involves a distinct implication that, as to cases where infants and other persons under disability have not appeared by general or special guardian, the limit of time within which they have absolute time to contest the probate is one year after the disability has ceased. After that, they may appeal to the discretion of the Surrogate, whose decision may be reviewed on appeal (§ 2481). The application must be denied.

Ordered accordingly.

MACHINI v. ZANONI.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
February, 1882.

MACHINI v. ZANONI.

In the matter of the estate of ANTONIO D. GHIO, deceased.

Where a woman flees from her husband and enters immediately on illicit relations with another man, which she continues for five years, there is no presumption at the end of that time, in the absence of evidence to the contrary, that her husband is dead.

The petitioner was married to M. in 1855, and lived with him in New York city until 1861, when she suddenly left his house, and, going to premises provided by decedent, cohabited with him until his death, in 1881, never again seeing M., or concerning herself about him. The cohabitation with decedent was confessedly meretricious until 1865, during which year, according to petitioner's testimony, a sort of ceremonial occurred, which she deemed a marriage between them. On her application for letters of administration, as being decedent's widow, on the ground that, although she and M. had not been separated for five years when her alleged marriage with decedent occurred, their continued cohabitation after the lapse of that period, and the fact of their holding themselves out as husband and wife, raised the presumption of a marriage which was valid until annulled, under 2 R. S., 139, § 6, making such a provision in a case where a "person, whose husband or wife shall have absented himself or herself, for five years, shall marry," etc.,—

Held, that M., not having "absented himself," the statute did not apply, and that, there being no proof or presumption of his death, any marriage between petitioner and decedent was absolutely void under 2 R. S., 139, § 5, and the petition should be denied.

APPLICATION for letters of administration upon decedent's estate, and for the revocation of such letters already granted to his sister, Augustina L. Zanoni. The facts appear sufficiently in the opinion

LORENZO ULLO, *for petitioner.*

HORATIO F. AVERILL, *for administratrix.*

THE SURROGATE.—Ghio died in June, 1881. In July, letters of administration were granted to his sister. The petitioner subsequently applied for the revocation of those letters, claiming that she herself was the widow of the deceased, and as such entitled to administer upon his estate. This was disputed, and thereupon a reference was ordered for taking testimony as to whether, at the time of Ghio's death, the petitioner was his lawful wife. The referee has filed his report, together with his opinion, which is adverse to the claim of the petitioner. By her own testimony, it appears that, in the year 1855, she was married to one Andrew Machini, and that, in 1861, she was living with him in Sullivan street, New York city. One morning in January of that year, after her husband had left the house, and without previous announcement of her purpose, she betook herself to premises provided for her by the decedent Ghio, lived with him thereafter, as if she were his wife, until his death in 1881, and, from the day when she abandoned Machini, never saw him, and, so far as is disclosed by the testimony, never tried to see him, or concerned herself as to his whereabouts. Her intercourse with Ghio was confessedly meretricious until 1865. In that year, if the petitioner is to be believed (and I agree with the referee that under all the circumstances her story may well be doubted), some sort of a ceremonial occurred, which she deemed a marriage between herself and Ghio. An old man, with a name "something like Olse, but longer than that," whom she had never seen before, and never saw afterwards, and whom she believed to be a notary, asked her if she was willing to marry Ghio, and she answered "Yes." And then "Olse" announced that she was to

be faithful to Ghio, and that they were man and wife. So far as she knows, Ghio was asked no question, made no promises, and received no injunctions of fidelity, and the occurrence was never afterward a subject of remark between herself and him.

It is declared by statute that a second marriage contracted by any person, during the life-time of a former husband or wife, is absolutely void, unless such former husband or wife has been sentenced to life imprisonment, or unless the first marriage has been annulled or dissolved (3 *R. S.* [6 ed.], 148, § 4, subd. 1, 2).

Now, it is not claimed that the marriage between Machini and the petitioner was ever annulled or dissolved, or that he was ever sentenced to life imprisonment. Any intermarriage, therefore, of Ghio and the petitioner was absolutely void, if it occurred during the life-time of Machini.

This raises the question whether, in the absence of any direct evidence on the subject, Machini must be presumed to be alive, or must be presumed to be dead. The petitioner swears that, in 1864, Ghio and somebody else told her that her husband was dead. This is manifestly insufficient evidence of the fact of death, and no stress is laid upon it by the petitioner's counsel.

But it is urged that this case falls within an exception to the statutory provision above cited, which is as follows: "If any person whose husband or wife shall have absented himself or herself, for the space of five successive years, without being known to such person to be living during that time, shall marry during the life-time of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pro-

nounced by a court of competent authority" (*Id.*, § 5).

It is insisted that, although Machini and the petitioner had not been separated for five years when her alleged marriage with Ghio took place, their continued cohabitation after the five years had elapsed, coupled with the fact that they held themselves out to the world as husband and wife, raises a presumption of a new marriage, which is valid until annulled; that the law will rather presume Machini to be dead, than the petitioner to be guilty of bigamy, and that this court must, accordingly, find her to have been Ghio's wife at the time of his decease. The brief of counsel, in advocacy of this claim, is ingenious, and the authorities cited to some extent support his position.

It is, doubtless, the law of this State that a second marriage of one who is within the prohibition of the statute may be inferred from matrimonial cohabitation, after the death of the person whose continued life caused the disability. To this effect are the decisions in *Rose v. Clark* (8 *Paige*, 574); *Fenton v. Reed* (4 *Johns.*, 52); *Hyde v. Hyde* (3 *Bradf.*, 509).

But those cases are unlike the present case, because there is no evidence here that Machini is dead. It is, however, insisted that his death must be inferred from his long absence, and numerous authorities are cited as sustaining that position. It will be found, upon careful examination, that they lend it no support. The analogy of those cases to the present would be complete, if it had been Machini, instead of the petitioner, who had disappeared from home with a paramour.

The exception of the statute is in favor only of one

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whose husband or wife shall have absented himself or herself for the space, etc. If A. and B. are together, and A. goes away, the situation is somewhat inaccurately described by saying that B. has "absented himself." In this respect, the case under consideration differs from those cited. See *Jackson v. Claw* (18 *Johus.*, 346); *King v. Paddock* (18 *Id.*, 141); *Cochrane v. Libby* (18 *Me.*, 39); *Greensborough v. Underhill* (12 *Vt.*, 604); *Lockhart v. White* (18 *Texas*, 102); *Rex v. Inhabitants of Twyning* (2 *Barn. & Ald.*, 386); *Spears v. Burton* (31 *Miss.*, 550).

EYRE, C. B., once characterized the application of the doctrine of presumption, in a case of this character, as an instance of "presumption run mad." But the doctrine there urged was by no means as mad as the one here sought to be maintained. A woman flees from her husband, and enters immediately upon illicit relations with another man. She continues those relations for five years. It is claimed that, at the end of that period, in the absence of any evidence to the contrary, the law will presume that her husband is dead. I think not. On the contrary, in the absence of any evidence to the contrary, if anything is to be presumed for the purposes of this proceeding, it must be that Machini is still in Sullivan street, where he was living twenty years ago. The conclusion which I have reached in this case is strongly supported by the decision in *O'Gara v. Eisenlohr* (38 *N. Y.*, 296), and by *Foster v. Hawley* (8 *Hun*, 71).

I find that the referee is correct in his opinion, and direct that the petition herein be dismissed.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
March, 1882.

SWARTOUT v. SCHWERTER.*

*In the matter of the estate of ALEXANDER C. POILLON,
deceased.*

A receiver appointed in supplementary proceedings (under Code Pro., § 298), on duly qualifying, became, without any assignment, completely vested with the judgment debtor's title to a chose in action then owned by him, and, as a consequence, to a judgment afterwards recovered in his name thereon. Such title could not be disturbed by an assignment afterwards made by such debtor, nor by the appointment of an assignee of his property in bankruptcy proceedings taken two years later, at least so far as such judgment or its avails were necessary to enable such receiver to satisfy the judgments under which he was appointed.

On April 15, 1876, Sw. was appointed receiver of the property of K., in supplementary proceedings instituted on certain judgments against the latter. At that time, a claim existed in K.'s behalf, against decedent, for services rendered by K. to him in his life-time, one-half of which claim, however, K. had assigned to X. On this claim, K. recovered a judgment against the executors, etc., of decedent, in May, 1876. In August of the same year, Sc. recovered a judgment against K., who, in January, 1877, in obedience to an order made in proceedings upon that judgment, assigned to Sc. one-half of the judgment so recovered against the executors. The last-mentioned judgment was afterwards set aside, but another was entered in K.'s name against the executors, in February, 1880. In May of that year, K. was discharged in bankruptcy from all his debts existing December 27, 1877. In proceedings for the distribution of the proceeds of a sale of decedent's real estate for the payment of his debts, a contest arising on the question to whom the share corresponding to the half of K.'s demand not assigned to X. belonged,—

Held, that, as such share was less than the aggregate amount of the judgments represented by Sw., he was entitled thereto for the benefit of the creditors in those judgments,—he having qualified before the assignment to Sc., and his title not being affected by that assignment, nor by the bankruptcy proceedings, or the discharge of K. therein.

* See p. 43, *ante*, for a previous decision in this matter, on another point.

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REARGUMENT of exceptions to report of referee (appointed, in creditor's proceeding to sell decedent's real estate for the payment of debts, to take proof of a claim for which John Kavanagh had recovered a judgment against one Wilson and others, executors, etc., of decedent, and of the rights and interests of certain parties therein), so far as the same related to the respective rights of Augustus Schwerter and T. G. Swartout, receiver, etc., to certain proceeds of sale awarded by said report to the former.

The facts appear sufficiently in the opinion.

NELSON SMITH, *for T. G. Swartout.*

C. C. EGAN, *for Augustus Schwerter.*

THE SURROGATE.—Certain judgments were recovered against one Kavanagh, prior to April 15, 1876. On that day, one Swartout was appointed receiver of Kavanagh's property, in proceedings supplementary to execution upon these judgments. At the time of this appointment, there subsisted a claim and demand, in behalf of Kavanagh, against the executors of the decedent, for services which Kavanagh had rendered him in his life-time. One-half of this demand had been assigned by Kavanagh under circumstances not necessary to be here considered. This demand constituted a chose in action, to one-half of which Kavanagh, at the time of the receiver's appointment, was entitled, against decedent's executors. In May, 1876, Kavanagh recovered judgment against them. In August, 1876, one Schwerter recovered a judgment against Kavanagh, who subsequently, in January, 1877, in pursuance of an order made in proceedings upon such judgment, assigned to Schwerter the one-half of the judg-

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ment he himself had recovered against Poillon's executors. The judgment so assigned was subsequently set aside, but another was obtained, upon the same demand, against the same parties, in February, 1880. It is that one-half of the judgment against the executors of the decedent which is the bone of this contention. In May, 1880, Kavanagh obtained his discharge in bankruptcy, from all his indebtedness prior to December 27, 1877. It is claimed that this discharge swept away the judgments touching which the receiver was appointed, and such interest, if any, as he had obtained thereunder; but that it left unimpaired the assignment to Schwerter, and the rights which he had thereby acquired. And it is insisted that Schwerter's claim to the one-half of the judgment now in question is still in force.

If the title to one-half of Kavanagh's demand passed to the receiver, it is manifest that the judgment creditors, on whose motion he was appointed, are entitled to have the same and the avails thereof applied upon their judgment, notwithstanding the proceedings in bankruptcy which resulted in Kavanagh's discharge (see cases cited hereafter). The assumption that the title did not so pass seems to me to ignore entirely the effect of section 298 of the former Code of Procedure, pursuant to which the receiver was appointed. It is now settled that such a receiver who had duly qualified became, by virtue of such appointment and qualification, even without any assignment to him by the judgment debtor, completely vested with the title of the personal property of the debtor, and with all his right and interest therein, for the benefit of those at whose instance he was appointed (*Chautauqua Co. Bank v. Risley*, 19 *N. Y.*, 375; *Porter v. Williams*,

9 *Id.*, 142 ; *Bostwick v. Menck*, 40 *Id.*, 383 ; *Wing v. Disse*, 15 *Hun*, 190).

We have seen that the demand, upon which the judgment was obtained by Kavanagh, was a chose in action existing at the time of the receiver's appointment, to one-half of which Kavanagh was then legally entitled. As the receiver was appointed and had qualified before the assignment to Schwerter, he became thereby entitled, for the benefit of the judgment creditors, as against the assignee, to one-half of that demand, and as a consequence to one-half of the judgment procured thereon. This interest of the receiver and of the creditors was not affected by the proceedings taken in bankruptcy two years later, nor by the discharge therein of Kavanagh.

No assignee appointed in such proceedings could disturb the title which the receiver had acquired to the judgment in question, nor the interest therein of the judgment creditors whom he represented, at least so far as such judgment or its avails were necessary to enable the receiver to satisfy the judgment (*Wilson v. City Bank of St. Paul*, 17 *Wall.*, 473 ; *Mays v. Fritton*, 20 *Id.*, 414 ; *Doe v. Childress*, 21 *Id.*, 643 ; *Marshall v. Knox*, 16 *Id.*, 551 ; *Yeatman v. Savings Institution*, 95 *U. S.*, 764 ; 101 *Id.*, 738 ; *Sedgwick v. Menck*, 1 *Nat. Bank. Reg.*, 675).

I have reason to believe that the cases above cited were not called to the attention of my predecessor, or of the referee in this proceeding ; else a different disposition might have been made of this matter. As I agree with the referee that a certain other assignment, made by Kavanagh in January, 1876, was invalid, and as the aggregate amount of the judgments to which the receiver

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Swartout is entitled, exceed the one-half part of the judgment in question, I think that such one-half part should be awarded to the receiver.

The referee's report may be so modified, and a decree entered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SUREGATE.—
March, 1882.

GEOGHEGAN v. FOLEY.

In the matter of the guardianship of the infant children of DANIEL FOLEY, deceased.

Section 2852 of the Code of Civil Procedure, which provides that a testamentary guardian who does not qualify within thirty days after probate of the will shall be deemed to have renounced, is inapplicable to a will proved before September 1, 1880.

Under *Laws* 1877, ch. 206, the only method of defeating the rights of a testamentary guardian was by proceedings taken to compel him to qualify within a time specified.

It seems, that before the enactment of that chapter, the right of such a guardian to act was derived solely from the appointment in the will (2 *R. S.*, 150, §§ 1, 2).

Where letters were issued to a testamentary guardian February 26, 1878, the decree admitting the will to probate being entered as of March 4, 1878, it appearing, from recitals in the letters and otherwise, that the entry, as of that date, was an inadvertence, and that the date of admission was in fact earlier than that of the letters; on an application to revoke the letters, made after the guardian had been actively engaged for nearly four years in the execution of his trust, by one who was appointed guardian in 1880,—

Held, that the decree should be amended by dating it February 26, 1878; that the letters of the guardian last appointed should be revoked; and that the petition of the latter for revocation of the former guardian's letters should be denied.

COUNTER motions by Ellen Geoghegan and John Foley, to revoke letters of guardianship of infant children

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of decedent. The facts appear sufficiently in the opinion.

GEO. O. CLARK, *for Ellen Geoghegan.*

JOHN H. STRAHAN, *for John Foley.*

THE SURROGATE.—In November last, letters of guardianship were issued to an aunt of certain infant children of decedent. A motion is now made in her behalf to vacate letters previously granted to John Foley, an uncle of the children, as testamentary guardian. A counter motion is also made to revoke the first mentioned letters. The citations for probate of decedent's will were made returnable February 19, 1878, and on that day were taken, the proofs touching its execution.

Upon these papers and proofs, appears the following indorsement, purporting to have been made by my predecessor: "Admitted March 4, 1878, as to Real and Personal. D. C. C." The words "March 4," have very manifestly been written over others partly erased. The words underneath, as I read them, are "Feb'y 26." On the same paper, there are written, in lead pencil, the words "objection to be filed to granting letters." These words have been partly obliterated by penciled lines drawn through them. The letters of guardianship issued to the testamentary guardian, as well as those recorded in the record books of this office, are dated February 26, 1878, and recite that the will had been admitted to probate, February 23, 1878.

The formal decree, admitting the will, recites that opposition was made thereto on February 19, 1878; that it was afterward withdrawn, and that the will was admitted March 4, 1878. In the papers submitted by counsel,

there is nothing to explain these erasures and contradictions. It is certain, however, that the proofs as to the execution of the will were taken on February 19, 1878, the return day of the citation for probate; and it is fair to infer from this, from the recitals in the letters of guardianship, and from the fact of their issuance, that the proofs were regularly taken; that any opposition which had been offered to the probate had been withdrawn before the letters were issued to the testamentary guardian; and that the formal decree admitting the will to probate was entered by inadvertence, as of March 4, 1878, when it should have been entered as of a date on or prior to the date when such letters were issued. There is nothing in the records of this office, or in the papers submitted on this motion, inconsistent with this view. Indeed, it seems to me the only one reconcilable with all the facts. It is not claimed that the testamentary guardian, whose right to letters is questioned, was guilty of any fraudulent or improper conduct in procuring them. For nearly four years, he has been actively engaged in the execution of the trust, and his right so to act is now for the first time challenged. Unless the circumstances of the case imperatively demand it, I ought not, at this late day, to vacate his letters, and by such action, place him in the attitude of an intruder. The circumstances do not seem to me to demand such action. I shall, therefore, in furtherance of justice, permit an amendment of the decree admitting the will to probate, so that it may bear date as of the day when the letters of testamentary guardianship were issued. It goes without saying that the letters issued to the aunt must accordingly be revoked. Indeed, this action would be proper, even if the

letters of the testamentary guardian were a nullity. The will nominating the guardian was proved prior to September 1, 1880. Section 2852 of the Code,—which provides that a testamentary guardian who does not qualify within thirty days after the probate of the will, shall be deemed to have renounced,—is inapplicable to such a will (*Matter of Lambrecht*, MS., March, 1881; *Redf. Prac.* [2 ed.], 737, 738). The provisions of chapter 206 of the Laws of 1877 indicate the procedure here applicable. By those provisions, the rights of a testamentary guardian, recognized by the Revised Statutes, are liable to be defeated only by an enforced renunciation in the manner prescribed in the act; and although the act of 1877 was repealed by *Laws* 1880, ch. 245, (the repeal to take effect September 1, 1880), still such rights, so secured and so liable to be defeated, seem to have been preserved by section 3352 of the Code. The act of 1877, taken in connection with sections 9 and 10 (3 *R. S.* [6 ed.], 74), provides in substance that, if the testamentary guardian does not qualify within thirty days after the probate, proceedings may be had in the Surrogate's court to compel him to qualify within a time specified. It is in default of his so doing that he is deemed to have renounced. But unless such proceedings are taken to enforce renunciation, there seems to be no limit to the time, within which he may qualify and secure letters, although he is incapable of acting until he has qualified. I think the aunt should have availed herself of these provisions to effect the renunciation of the testamentary guardian, before applying for letters herself. If it be true, as is claimed, that the act of 1877 has been absolutely repealed, and has ceased to operate since September, 1880, the

status of the aunt is practically not improved. Section 2852, as has been already observed, affords no support to her claims. The rights of the contestant, in such an event, would be determined by the law as it existed prior to the passage of the act of 1877. By that law, a testamentary guardian derived his right to act solely from the appointment in the will (3 *R. S.* [6 ed.], 167, §§ 1, 2). The present testamentary guardian, in that view, would be the lawful guardian, and entitled to act as such even without letters. I am satisfied, however, that under section 3 of the repealing act of 1880 (which is substantially to the same effect as section 3349 of the Code) the procedure provided by the act of 1877 is continued, as to testamentary guardianships under wills probated before September 1, 1880.

1. The letters issued to Ellen Geoghegan should be revoked.

2. Those of John Foley should stand.

3. The decree admitting the will to probate should be amended as I have indicated.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SHERIFF.—
March, 1882.

YOUNGS v. YOUNGS.

In the matter of the estate of THEOPHILUS YOUNGS, deceased.

Courts are not bound, as of course, to grant to a witness the claim of privilege from giving incriminating testimony, simply because he swears that the necessity for its exercise has arisen, but themselves

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have an authority and discretion in the premises; and they should not concede the claim where the nature of the question does not, under the particular circumstances apparent at the time, immediately suggest the reasonableness of the claim and the injustice of denying it.

It seems, that a witness, who has disclosed, without objection, part of a transaction, wherein, under circumstances tending to criminate him, he has been engaged, is bound, if thereafter questioned, to testify fully concerning that transaction: that, by voluntarily answering in part, as to that very transaction, he waives the privilege of refusing to answer, which he might have enjoyed at the outset, if he had chosen to solicit it.

Letters of administration upon the estate of T. having been granted October 12, 1877, on an allegation of his death, to one who applied therefor as his widow, proceedings were instituted February 27, 1878, by his brother, to revoke those letters on the ground that T. was then alive. A witness was produced who swore, on his direct examination, that he was T., and on his cross examination testified, without reluctance, as to the events of his life prior to 1875, in which year, according to his statement, he left Boston, not visiting that city again until 1880. Upon being asked whither he went on leaving Boston, he declined to answer on the ground that his reply would tend to charge him with a crime. He refused to name any person with whom he had lived or associated during that period, or to state any business or occupation in which he had been engaged. He testified that he had been neither in prison nor under arrest, but when asked if he had been charged with crime, he again invoked his privilege and declared that he would answer no more questions in that regard. *Held*,

1. That since, at the time when the witness refused to answer the questions put to him on cross-examination, he had not disclosed any transaction, whatever, occurring within the five years as to which he subsequently declined to testify, he did not waive his privilege within the rule secondly above stated; but
2. That since, at the time of the refusal, no subject had been broached which even faintly suggested the possibility of witness's connection with the commission of a crime, his bare statement that his answer might tend to criminate him, was an insufficient basis of his claim of privilege; and that he must be recalled for further examination.

In respect to this claim of privilege, there are two extremes which ought equally to be avoided: First, that of requiring, from a witness who has honestly claimed the privilege, any explanation whatever of his reason for refusing to answer, if the court can see how such answer may fairly and reasonably tend to criminate him; and second, that of permitting a witness to interpose the shield of apprehended peril as a protection against every question which he is disinclined to answer, although there be nothing in the circumstances of the case which in the least suggests the danger.

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THIS was a motion to vacate an order directing the recall of a witness for further examination. The facts appear sufficiently in the opinion.

ELIAS G. DRAKE, JR., and HENRY BRACE, *for the motion.*

C. ELLIOTT MINOR, *opposed.*

THE SURROGATE.—Letters of administration upon the estate of Theophilus Youngs were granted, on October 12, 1877, to Mary H. Youngs, who had applied for the same as his widow.

On February 27, 1878, his brother, Henry Youngs, instituted proceedings to revoke those letters, claiming that Theophilus was then alive. It was thereupon referred to Edward F. Underhill, Esq., to take testimony upon the issue thus raised. During the examination before him, a person was produced and sworn as a witness, who stated, upon his direct, that he was Theophilus Youngs himself, the husband of the respondent and the brother of the petitioner; and who gave certain other testimony which has no special bearing upon the question now before me for decision. The witness was then subjected to a searching cross-examination by the respondent's counsel, and was inquired of at length as to various incidents of his life, from his childhood until the year 1875. He testified that, in that year, he left the city of Boston, which he next visited for the first time in August, 1880. As to the events of his life prior to 1875, he gave testimony without reluctance; but, when he was asked to what place he went when he left Boston, he declined to answer. In response to an inquiry by the referee, he said that he declined because an answer would have a tendency to charge him with a crime. He

stated that he remained for five years in the locality to which he went in 1875. He refused to name any person with whom he had lived or associated during that period, or to state any business or occupation in which he had been engaged. He said that he had neither been in prison nor under arrest; but, when asked if he had been charged with crime, he again invoked his privilege, and declared that he would answer no more questions in that regard.

In all these refusals to answer, he was sustained by the referee. Upon the coming in of the referee's report, respondent's counsel successfully insisted before the late Surrogate that, in sustaining the claim of privilege which the witness had urged, the referee had erred. Surrogate Calvin thereupon made an order that the witness should be recalled for further examination, in the matters touching which he had previously refused to answer. Since the issuance of that order, I have allowed and heard a re-argument of the question to which it relates.

I am now asked, in behalf of the petitioner, to set it aside. Two legal questions, both of the greatest importance in the administration of justice, are involved in this inquiry. It is a strange circumstance that neither of them seems to have been directly passed upon by the courts of this State. This circumstance has led me to give them special consideration, and now prompts me to review at some length the English and American authorities pertinent thereto.

These questions are: 1st, Is a witness, who has to some extent voluntarily testified as to matters tending to criminate him, bound for that reason, despite his claim of privilege, to testify fully upon further inquiry as to

such matters? and, 2d, Does the determination of the right to exercise such privilege belong to the witness himself, or to the tribunal before which he is giving his testimony?

It is earnestly claimed, by the respondent, that the first question must be answered in the affirmative, and that such answer is decisive of the present issue. It is insisted by her that the witness, by voluntarily replying to the inquiries put to him upon the direct examination, was precluded from interposing the claim of privilege which he subsequently set up. No New York decision has been cited, either in support of this position or against it.

The English doctrine, as to the effect of partial disclosure, was established in 1847, in *Reg. v. Garbett* (2 *Car. & Kir.*, 475; 1 *Den. C. C. Res.*, 236). It has never been questioned since. That case holds (nine of the judges agreeing) that a witness is entitled to the privilege of refusing to disclose what may tend to criminate him, at any stage of his examination when he chooses to assert his claim, and despite the fact that he has already voluntarily answered, in part, as to the same matter.

On the other hand, it has been held, in the courts of several States in our own country, that a witness, although he claims his privilege, may, nevertheless, be compelled to answer questions bearing upon subjects as to which he has previously and without objection given his testimony. A fair exposition of the rule laid down in these American decisions may be found in the case of *State v. K.* (4 *N. H.*, 562). K. was charged with unlawfully disinterring a dead body. Upon the trial, a witness was called in his behalf, who stated that he knew the

respondent to be innocent, but that he could not tell how he knew, without implicating himself, and he inquired of the court whether he was bound to testify at all, and, if so, how far he was compelled to go. The court held that the witness could not be compelled to declare that he knew the respondent to be innocent, if a full explanation would tend to criminate himself, but that, if he chose to testify at all, he must state how he knew that the defendant was not guilty.

It seems to me that the very broadest statement which the American reports contain, as to the effect of partial disclosures upon the privilege of a witness, is too narrow to include the case now under discussion. I am satisfied, upon careful examination of the authorities relied upon by respondent, and of others cited below, that the doctrine which they maintain is inapplicable to the present situation. They decide this and this only—that a witness, who has disclosed without objection part of a transaction, wherein, under circumstances tending to criminate him, he has been engaged, is bound, if thereafter questioned, to testify fully concerning that transaction. By voluntarily answering in part as to that very transaction, he is deemed to have waived that privilege of refusing to answer which he might have enjoyed at the outset, if he had chosen to solicit it.

Such seems to me a fair interpretation of the decisions in the following cases: *State v. K.* (4 *N. H.*, 562); *Chamberlain v. Willson* (12 *Vt.*, 491); *Norfolk v. Gaylord* (28 *Conn.*, 309); *Brown v. Brown* (5 *Mass.*, 320); *State v. Foster* (3 *Foster*, 354); *Low v. Mitchell* (18 *Me.*, 374); *Coburn v. Odell* (30 *N. H.*, 540); *Commonwealth v. Lannan* (13 *Allen*, 564); *Commonwealth v. Price* (10 *Gray*,

472); *Foster v. Pierce* (11 *Cush.*, 437); *Woburn v. Henshaw* (101 *Mass.*, 193); *Commonwealth v. Nichols* (114 *Id.*, 285); *Commonwealth v. Pratt* (126 *Id.*, 462); *Alderman v. People* (4 *Gibbs* [*Mich.*], 414).

The present case can be distinguished from all the foregoing cases in this: that, at the time the witness refused to answer the questions put to him in cross-examination, he had not disclosed any transaction, whatever, occurring within the five years as to which he subsequently declined to testify. On the other hand, in every one of the reported cases which have come under my observation, wherein the court refused to sustain a claim of privilege, on the ground that it had been waived, the immediate transaction, as to which the witness set up his right to be silent, had already been partly revealed by him. The case of *State v. K.*, which has been already noted, is in this respect a fair type of all its class. I find no support, therefore, either in English or American authorities, for the respondent's claim that the witness in the present case had put himself outside the pale of his privilege, by answering certain questions preceding those which have occasioned this discussion.

This decision makes it necessary to determine whether courts are bound, as of course, to grant the claim of privilege to a witness, simply because he swears that the necessity has arisen for its exercise, or whether, on the other hand, they themselves have certain authority and discretion in the premises.

And if the latter proposition is to be maintained, there remains to be determined the further question whether, upon the facts of this particular case, the claim

of the witness was well or ill-founded, and should or should not have been allowed.

Upon this important and delicate subject, the decisions of the courts of this State throw very little light, but the history of English jurisprudence is interesting and instructive. The earliest reported case in which the question seems to have been much discussed is that of *Regina v. Garbett* (2 *Car. & Kir.*, 474). This case was argued in 1847, in the central criminal court, before twelve of the fifteen judges. Nine of them were of opinion that, if a witness claimed the protection of the court on the ground that the answer would tend to criminate him, "and there appeared reasonable ground to believe that it would do so," he was not compelled to answer. They did not decide (says the reporter), as the case did not call for it, whether the mere sworn declaration of the witness, that he believed the answer would tend to criminate him, would or would not be sufficient to protect him, where sufficient other circumstances did not induce the judge to believe that such answer would have such tendency.

The next decision of the English courts upon this subject was in 1851. In *Short v. Mercier* (15 *Jur.*, 93), which was an appeal from the vice-chancellor, in a case involving this question, the lord chancellor gives full expression to his views. Witness below had claimed protection from examination, in reference to a stock-jobbing transaction. The chancellor declares that, in view of the extensive opportunities for evasion of justice under pretense of the rule as to privilege, it is a serious duty upon every judge to see to it, as far as he can, that the privilege is not abused. "Now, the question is," he

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remarks, "whether the defendants, upon the present occasion, have shown to the court sufficient circumstances to entitle them to credit for the oath which they have made, and to protect them from answering the questions." He then reviews the testimony in the case, at length, and concludes by holding that the refusal to answer was, under the circumstances, properly sustained. "It is difficult," he adds, "to say how little or how much is required; but this, at least, will satisfy the rule: If a party states circumstances, which, on the face of them, are not only consistent with the existence of the peril, but which also render it extremely probable (it may be stated in much less forcible terms than that), he entitles himself to the protection. I admit there may be cases in which it would be extremely difficult to say enough is disclosed to satisfy the judge that a privilege ought to be allowed."

During the next year (1852), the case of *Fisher v. Ronalds* was decided in the court of common pleas (12 *Com. Ben.*, 762; 17 *Jur.*, 373). A witness, who was called to prove that a bill of exchange was given for losses at play, having testified that he was present in a room in his own house, when the transaction was claimed to have taken place, but that he saw no gaming, was asked: "Was there a roulette table in the room?" He was cautioned by the court, and claimed his privilege. In the course of a colloquy between opposing counsel and the court, counsel suggested that it was for the judge to decide, as soon as the witness declined to answer, whether the question had a tendency to criminate him, and that here the question was too remote.

MAULE, J.—"It is impossible for any one but the

witness to say whether his answer will or will not tend to criminate him. If the judge is to require the witness to point out how his answer would criminate him, the privilege would be worse than useless. How can you say that, with other circumstances, the witness might not thereby be convicted of keeping a gaming-house?"

Counsel.—"If the witness is to be the sole judge, an unwilling or corrupt witness will always be able to defeat justice, if the parties in court are to be bound by his refusal to answer."

MAULE, J., persisted, nevertheless, that it was for the witness to say whether he believed that the answer would tend to criminate, and that his declaration was conclusive.

It will be observed that, in the case just cited, both MAULE, J., and JERVIS, C. J., gave to the privilege of a witness far wider range than it was ever allowed before, or has ever been allowed since, by the English courts. The former intimated, however, and so did WILLIAMS, J., that the occasion did not call for any absolute decision upon the general proposition whether a court was bound by the refusal of a witness, as the criminating tendency of the question in the case then under review was very manifest.

Next came, in 1855, the case of *Osborn v. London Dock Company* (10 *Exch.*, 698), in which this matter was much discussed. PARKE, B., inclined to the view that a witness should satisfy the court that the effect of his answering the obnoxious question would tend to endanger him. He referred to the case of *Regina v. Garbett* (*supra*), stating that such was the opinion of a majority of the judges, although they refrained from deciding the

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precise point; and he cited also the opinion of Lord Chancellor TRURO, in the case of *Short v. Mercier* (*supra*).

Next followed, in 1857, the case of *Sidebottom v. Adkins* (3 *Jurist N. S.*, Pt. 1, 631). The vice-chancellor said there was no doubt about the rule. The difficulty was as to the application, which was one of public policy. He said that some surprise had been excited in his mind, by the alleged opinions of the late Chief Justice JERVIS and Mr. Justice MAULE (see *Fisher v. Ronalds*, *supra*). They had intimated that it was enough, if the person interrogated should declare, upon his oath, his opinion that his answer would tend to criminate him, and that he was to be the sole judge upon this subject. The vice-chancellor declared that such ruling was not countenanced by the other authorities; that there might be cases in which, from their nature, a witness ought to be allowed to be the sole judge; but that to hold broadly, that the court was concluded by the statement of the witness, was "going far beyond anything that could be justified." He declared his approval of the doctrine laid down in *Phillips on Evidence*, that the court must, according to the circumstances of the case, judge whether the statement of the witness should be deemed conclusive. This decision is of special importance, as in this instance it was held that the witness was not privileged. He had "vaguely and generally," the court said, "forming his own opinion of the law, and taking it into his own hands, chosen to state that opinion upon oath, as a reason for not answering interrogatories which did not, on their face, appear to be links in

a chain of evidence which would lead to a criminal prosecution.”

The question was mooted again in the common pleas, in 1861 (*Exp. Fernandez*, 10 *Com. Ben. N. S.*, 39). This was a proceeding to punish for contempt a witness who had refused to answer after the trial court had passed adversely upon his claim of privilege. WILLES, J., says: “As to the objection that the witness’s refusal to answer was no offense, because it was for the witness and not the judge to determine whether the question was one which he was bound to answer, that is a startling proposition. Every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence, to the best of his knowledge, upon any question of fact, material and relevant to an issue tried in any of the queen’s courts, unless, etc. Some judges, out of tenderness for the witness, have held it a sufficient excuse if he swears that, in his opinion—where such opinion may be well founded—his answering will tend to criminate him. Some have thought this too lax and yielding a practice, but there has never been any doubt that it is for the court to decide whether the circumstances judicially before it are such as to excuse the witness from answer.”

The latest decision of the English courts is that of *Regina v. Boyes* (fully reported in 1 *Best & Smith*, 329). This case was determined in the court of queen’s bench in 1861. Says COCKBURN, Ch. J., pronouncing the opinion: “It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if

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not manifestly made *mala fide*, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of the opinion that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We, indeed, quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; there being no doubt, as observed by ALDERSON, B., in *Osborn v. London Dock Company*, that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril. Further than this, we are of the opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things. . . . The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of law. But it would be to convert a salutary protection into a means of abuse, if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was

sufficient to justify the withholding of evidence essential to the ends of justice."

The foregoing cases abundantly establish that, by the English authorities, the bare oath of a witness, that an answer may tend to criminate him, is not deemed of itself conclusive, but that the judge is called upon to exercise his discretion in determining, whenever the privilege is asserted, whether an occasion has arisen for its rightful exercise. The witness, in every case, must pledge his oath as to his own view of the matter. In many, and doubtless in most, instances, this of itself will and should satisfy the court; but it "does not preclude the court from further investigation." I have found no important American authority, which seems to be in conflict with the English view.

The case of *People v. Mather* has been sometimes referred to as supporting the doctrine that the question of privilege is to be determined solely by the witness himself. That case does not maintain any such doctrine. At the trial of *Mather*, for conspiring with others to abduct William Morgan, a witness was asked whether, on the evening of September 13 (that being the date when the offense was claimed to have been committed), he was at the house of Solomon C. Wright, in New Fane (that being the place where there was evidence to show the abducting party assembled). The witness declined to answer the question, on the ground that the answer might criminate him in the very transaction under investigation. The trial court ruled in his favor, and its ruling was sustained by the Supreme court. Judge MARCY elaborately discusses the question whether the circumstances, apparent to the trial court at the time the

witness asserted his privilege, were such as to justify the refusal to answer. He intimates that the disclosures of the evidence, at that stage of the trial, were such as to suggest the possibility that Morgan had been murdered, and that, accordingly, an affirmative answer to the question put to the witness might furnish a link in a chain of evidence against him, as a participant in a felonious homicide. Judge MARCY states his conclusion broadly, in these words (*People v. Mather*, 4 *Wend.*, 229): "My conclusion is . . . that, where a witness claims to be excused from answering because his answer will have a tendency to implicate him in a crime, the court is to determine whether the answer he may give to the question can criminate him, directly or indirectly . . . and if they think the answer may, in any way, criminate him, they must allow his privilege without exacting from him to explain. If the witness was obliged to show how the effect is produced, the protection would at once be annihilated. The means which he would be, in that case, compelled to use to obtain protection, would involve the surrender of the very object for the security of which the protection was sought."

It seems to me that, upon the supposed authority of certain phrases and sentences in this opinion, a doctrine is urged in the present case, that would never have been sanctioned by the court which passed upon the case of *Mather*. Such was the posture of affairs at that trial, when the witness was asked the question objected to, that, without any further inquiry whatever, the trial judge could readily perceive how an affirmative answer might form a link in a chain of evidence, implicating the

witness in a criminal charge of the gravest character known to the law.

In the case at bar, on the other hand, the referee had nothing whatever before him, upon which he could base any opinion or judgment as to whether any peril might possibly result to the witness from his answering the questions proposed. Indeed, the status of this case seems to be no otherwise than if, immediately upon his coming to the stand, the witness had refused to answer any question whatever, under the claim that its answer would tend to criminate him. For, if he could absolutely hide from scrutiny five years of his life, he could, with equal propriety and justice, hide ten or twenty, or all the years since his birth.

The ruling of Chief Justice MARSHALL, at the trial of Burr, has also been frequently cited, as if it accorded to a witness the very sweeping privilege which is here claimed by petitioner's counsel (1 *Burr's Trial*, 243, 1807). It was urged, in Burr's behalf, that a witness must be, in the nature of things, the sole judge of the effect of his testimony, and that he might, therefore, refuse to answer any questions whatever, if he would declare upon his oath that an answer thereto might criminate him. The chief justice remarked that he thought the principle was too broadly stated; that he had considered the authorities cited in its support; that, in all of them, it could be perceived how an answer to the question might criminate the witness; and that they did not appear to him to support the principle in the full latitude in which it was stated. In the course of his decision, Judge MARSHALL says: "When two principles come in conflict with each other, the court must give them

both a reasonable construction. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. When a question is propounded, it belongs to the court to consider and decide whether any direct answer to it can implicate the witness." The chief justice then refers to the particular facts of the case before him, and decides that the witness must answer the question, despite his objection.

That the refusal of the witness is under some circumstances open to review by the court, is also sustained in *Commonwealth v. Braynard* (*Thacher's Criminal Cases*, 146); *Ward v. State* (2 *Mo.*, 98); *Richman v. State* (2 *Greene [Iowa]*, 532); *Floyd v. State* (7 *Texas*, 215); *Janvrin v. Scammon* (9 *Foster*, 289); *Kirschner v. State* (9 *Wis.*, 140); *Greenleaf on Evidence* [13 ed.], § 451; *Forbes v. Willard* (37 *How. Pr.*, 193).

Now, unless the claim is well founded, that the trial court is absolutely bound by the oath of the witness, I cannot see how the action of the referee in the present matter can be sustained. I have been able to find no reported case, in which this privilege of refusing to answer on account of possible peril has been successfully invoked, where the nature of the question did not, under the particular circumstances, apparent at the time, immediately suggest the reasonableness of the claim and the injustice of denying it. This subject has already been discussed at such length that no review of decided cases is practicable, but the correctness of the proposition above stated will be apparent upon examination.

At the time the witness Youngs refused to answer, no subject had been broached which even faintly suggested his possible connection with the commission of a crime. It was of the highest importance for the respondent to learn from the witness himself, whose claim to be Theophilus Youngs was the very matter in dispute, where he had been and what had been his surroundings from the time in 1875 when, as she claimed, the real Theophilus Youngs had died, up to that time, in 1880, when the witness stated that he had re-appeared in Boston after an absence of five years. Without any intimation, whatever, as to the necessity for his reticence upon this vital subject, save his own bare statement that his answer might tend to criminate him, the witness flatly refused to give any testimony as to his whereabouts during all that five years, or as to any incidents of his life, or any circumstances whatever which might have been the subject of after-investigation by the respondent, and possibly have tended to show that he was not, in fact, Theophilus Youngs, because he was somebody else.

To claim that, under these circumstances, the refusal to answer should have been allowed is to exalt the privilege of a witness much farther above the rights of parties and the prerogatives of courts than seems to be consistent with a due administration of justice. If such a view of the law is correct, any person summoned to testify who chooses to assert, however absurdly or whimsically or corruptly, that to answer questions at all may tend to criminate him, must be indulged by the court, and suffered to go his way in silence; and this, too, without risk of contempt proceedings, for, if he is legally justified in his refusal, he does not, by such refusal,

render himself amenable to punishment or even censure. Another consequence must follow, if the doctrine of privilege is to be admitted in its widest extent. Despite the long line of authorities, holding that an accomplice who has once offered himself as a witness must disclose the whole story of his connection with the offense under investigation, such an accomplice, after opening the door of inquiry as far as suits his pleasure, may safely slam it in the face of a cross-examiner, if he is but discreet enough to claim that further disclosures may tend to threaten his security.

It seems to me that, in this matter, there are two extremes, which ought equally to be avoided: First. That of requiring from a witness, who has honestly claimed the privilege, any explanation whatever of his reason for refusing to answer, if the court can see how such answer may fairly and reasonably tend to criminate him. Second. That of permitting a witness to interpose the shield of apprehended peril, as a protection against every question which he is disinclined to answer, although there may be nothing in the circumstances of the case, which in the least suggests that such answers would be fraught with danger.

The latter extreme is quite as dangerous to public policy as the former. I shall not presume to suggest any general rule governing this subject, and doubt, indeed, whether any definite and precise rule can be prescribed. It is sufficient for the purposes of the present case to decide, as I do, that, under the circumstances disclosed to the referee at the time he sustained the refusals of the witness to answer, such refusals ought not to have been countenanced.

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I accordingly refuse to vacate the order heretofore made by my predecessor, directing the recall of the witness, Theophilus Youngs, for further examination.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
March, 1882.

COLEMAN v. COLEMAN.

In the matter of the estate of THOMAS J. COLEMAN, deceased.

Taxes assessed during the life-time of a decedent, upon real property in which he had a life estate, and remaining unpaid at the time of his death, are entitled to preferential payment out of the personalty left by him, under 2 *R. S.*, 87, § 27, subd. 2, which assigns a second preference to "taxes assessed upon the estate of the deceased previous to his death."

PETITION by William A. Coleman, to require Julia A. Coleman, administratrix, etc., of decedent, to render and settle her account, and pay out of the assets taxes assessed upon any property of which decedent was seized or possessed, either for life or in fee. The facts appear sufficiently in the opinion.

C. E. & D. B. OGDEN, *for petitioner.*

Q. McADAM, *for administratrix.*

THE SURROGATE.—Taxes assessed during the life-time of the deceased, upon certain real property in which he had a life estate, remained unpaid at his death. Are they entitled to preferential payment out of the personalty left by him? This preference is claimed under 3 *R. S.* (6 ed.), 95, § 37, subd. 2. The section provides that

executors and administrators shall pay the debts of the deceased in the following order: 1. Debts entitled to a preference under the laws of the United States. 2. Taxes assessed upon the estate of the deceased previous to his death.

I think that the taxes in question are debts of the deceased, which the administrator is required to pay out of the personalty of the deceased (*Seabury v. Bowen*, 3 *Bradf.*, 207; *Griswold v. Griswold*, 4 *Id.*, 217; *Gunning v. Carman*, 3 *Redf.*, 69; *Bates v. Underhill*, *Id.*, 365). Are they, however, such taxes as were "assessed upon the estate of the deceased previous to his death?"

This word, estate, has several meanings. Used in reference to land, it signifies the right or interest which the owner has therein; employed in wills or other instruments for disposing of property, it embraces property, both real and personal (1 *Edw. Ch.*, 239; 1 *Sandf. Ch.*, 334).

The interpretation of the word, in the statute under consideration, should be such as best accords with the intention of the legislature. The manifest object of the law was to make provision, for the interests of the State, of a fund available for speedy payment of taxes. Is there any difference in principle, between the present case, and one in which a decedent has died leaving an estate in fee, upon which taxes have been assessed in his life-time? No authorities have been cited for or against the claim of this petition, and the doubts which I intimated at the argument are not fully resolved; but on the whole, I am led to believe that the tax is entitled to a preference, and I so find.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
March, 1882.

ST. F. XAVIER COLLEGE v. DOHERTY.

In the matter of the estate of HUGH DOHERTY, deceased.

The testator, by his will, executed in 1871, shortly before his death, gave, substantially, all his property to his executors in trust, to receive the rents and profits, and to sell and convey the same at such time as they should deem advisable, directing that from such rents, etc., or from the proceeds of such sale, they should reserve, and pay to certain relatives, "a sum of money equivalent to the net annual rental for four years (after deducting taxes and expenses)" of a house and lot specified. He appointed residuary legatees. *Held,*

1. That, by the words quoted, the testator meant the rental, after deducting all expenditures in and about the property in question, including taxes, repairs, insurance, interest on mortgages, and other direct charges, for the four years succeeding his death.
2. That the relatives in question were entitled to interest on their legacies from the end of the said four years.

APPLICATION, by legatees, for a construction of decedent's will, on the judicial settlement of executor's account. The facts appear sufficiently in the opinion.

BLISS & SCHLEY, *for residuary legatees.*

EVARTS, SOUTHMAYD & CHOATE, *for other legatees.*

THE SURROGATE.—By his will, executed in 1871, not long before his death, the testator gave substantially all his property to his executors, in trust, to collect and receive the rents, income and profits, and to sell and convey the same, at such time as should be deemed advisable by them. He directed that, from said rents, income and profits, or from the proceeds of such sale, they should, after certain other payments, reserve and pay to certain relatives named "a sum of money equivalent to the net

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annual rental for four years (after deducting taxes and expenses),” of a certain house and lot at No. 106 Franklin street, New York city. He made the college of St. Francis Xavier and two priests of the order of St. Augustine his residuary legatees. In behalf of these residuary legatees, this court is now asked to interpret the clause of the will which has been quoted.

By providing for the payment of the bequest to his relatives from the rents, income and profits of premises No. 106 Franklin street, or from the proceeds of the sale of such premises, I think that it was the testator's hope and expectation that those bequests might be, in fact, discharged from such rents, income and profits. He had very little personalty available for their immediate payment, and he probably gave to his executors authority to sell, in order to avoid an unlawful suspension of the power of alienation, and not with any desire or disbelief that an early sale would, in fact, be resorted to.

In my view, these bequests might have become payable before the four years had elapsed, if, in the interim, the sale had taken place; but the testator desired and expected that, if no such sale should be effected, these legacies should, after the expiration of four years, be paid from the rents, income and profits meanwhile received.

The alternative direction, to pay the bequests from the proceeds of the sale of his property, does not, I think, militate against this view. In ascertaining the amount, to which these legatees would have been entitled, in case the property had been sold before the expiration of the four years, some embarrassment might have arisen. But the difficulty would not have been

insuperable. An equitable mode of adjustment, suitable to the case, could have been applied.

In fixing the bequest at a sum of money equivalent to the net annual rental for four years, after deducting taxes and expenses of the premises specified, I think the testator meant the net rental, after deduction of all expenditures in and about the property in question, including taxes, repairs, insurance, interest on the mortgages and other charges directly affecting the property for the four years succeeding his death. The provision in regard to deductions of taxes and expenses was not, in my opinion, intended to limit or qualify the meaning of the term "net rental."

The preservation of the premises out of the rents, income and profits, from which I have concluded the bequests were payable, necessitated the discharge, also, out of the same rents, income and profits, of the interest on the mortgage. The testator must have known this, and must have designed, I think, that payments necessary to make effective his intention to provide a fund from which to raise these bequests should be a charge upon that fund, and borne by those to be benefited by it, rather than by the residuary legatees.

The beneficiaries in question should be credited with interest on their legacies from the end of the fourth year after testator's death. The taxes to be deducted are only the current taxes for the four years. Those which had accrued before the testator's death are not deductible.

Ordered accordingly.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

BRISTED v. WEEKS.

*In the matter of the probate of the will of JOHN J. A.
BRISTED, deceased.*

Evidence of an hereditary tendency to insanity, in a testator, does not establish that insanity manifested was probably congenital, or that it declared itself at any particular stage of his career.

The opinion of a distinguished alienist, upon the probable mental condition of a patient, years before the latter had come under his observation, though entitled to respect, should be carefully scrutinized before acceptance, in a case where it is contingent upon the correctness of hypotheses not established by the evidence.

It seems, that, where one sustaining a fiducial relation to another is concerned in framing the latter's will to his own advantage, the instrument ought to be closely scrutinized, and that there is a presumption against its validity, strong or weak, according to the circumstances.

The testator, who died in 1880, by his will, executed in 1871, gave the bulk of his property, amounting to about \$500,000, to an adopted daughter of his father, and to two of his aunts, K. and S. His nearest relatives, living at the time of the execution, were a father, a half-brother, and four aunts. The probate was contested by the half-brother, aged thirteen years, mainly on the grounds of undue influence exerted by the husband of S., and a want of testamentary capacity. Mr. S. had long occupied intimate confidential and fiducial relations with testator; but, although his wife was a principal beneficiary, it was not shown that he drafted the will, or advised as to its contents, or even knew of testator's intending to make, or having made it. Testator was insane in the early part of 1873, when he became an inmate of an asylum in France; and he was of unsound mind at times thereafter, contestant insisting that the insanity was continuous after the date mentioned. A medical expert, who attended him at the asylum in 1873, would not undertake to state accurately his mental condition in 1871, but testified that, from his examination, and from what he then learned of his antecedents, from testator and from an aunt, B., he believed that the former was never in a condition of complete enjoyment of his intellectual faculties, or of balance in his nervous system. The information derived from B. was undisclosed by witness, and several of testator's declarations to him were against the weight of testimony; which was that testator manifested no irrationality until after 1871. A portion of the testimony,

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taken on commission, of a witness acquainted with testator, tended to show original mental aberration, but this portion was in response to the final general interrogatory, was vague as to dates, and in some particulars as to meaning, and was not followed by cross-examination. Certain collateral relatives of testator had been afflicted with mental disease, but there was no evidence of insanity in his lineal ancestry. Letters produced in evidence, written by testator before 1873, were in the main clever and amusing, often instructive, particularly on art subjects, and at times poetical and elegant. By a will executed in 1869, testator had made dispositions, also, in favor of B. and his other aunt, who were not mentioned in the will propounded, and which made no bequest to contestant, or, with an insignificant exception, to testator's father. Each of the two last named persons, however, had ample means.

Held, that the will was executed without undue influence on the part of Mr. S.; that its dispositions led to no inference of a disordered intellect on the part of the maker; that the latter was of sound mind at the time of its execution; and that it should be admitted to probate.

APPLICATION for the probate of decedent's will, by Francis H. Weeks, named as executor therein; opposed by Charles H. M. Bristed, a half-brother of decedent. The facts appear sufficiently in the opinion.

ROBERT W. DE FOREST, *for proponent*.

FREDERICK P. FORSTER, *special guardian for contestant*

WILLIAM E. CURTIS, *for Edith Kane, legatee*.

THE SURROGATE.—The admission to probate of the paper propounded in this court, as the last will and testament of the late John Jacob Astor Bristed, is resisted upon several grounds. It is claimed by the contestant that the evidence establishes:

1. That the instrument was not executed according to law.

2. That it is not in truth the will of the decedent, in that it is the product of such influence exerted upon him by his uncle, William E. Sedgwick, as is deemed in law "undue influence," sufficient to invalidate a will.

3. That, at the time of its execution, Mr. Bristed lacked testamentary capacity.

The decision of this case involves no novel or intricate question of law, but simply requires the application of well settled legal principles to the particular facts. I shall proceed, therefore, to declare my conclusions as briefly as practicable, without detailed reference to the great mass of testimony, the examination of which has occasioned my delay in passing upon these issues.

First. The first of the objections is that which relates to the factum of the will. It has not been pressed by contestant's counsel, and clearly has not been sustained by the evidence. The instrument was executed in November, 1871, and was offered for probate on June 30, 1880, Mr. Bristed having died during that month. The subscribing witnesses were George L. Lorillard and Townsend Harris. The latter had died before this instrument was propounded. His signature was proved and is not disputed. Mr. Lorillard testified that he signed his name as a witness, at the request of the decedent, who also, in his hearing, made a similar request of Mr. Harris. The three were together at the time, in the reception room of the Union Club. Mr. Lorillard saw Mr. Bristed himself subscribe his name to the paper, and heard him declare that it was his will. He also saw Mr. Harris sign as a witness. This shows a strict compliance with all the formalities prescribed by law.

Second. It is strenuously urged, by counsel for the contestant, that probate should be refused to this will, upon the ground that it was procured to be made and executed, by the undue influence of Mr. Bristed's uncle, William Elbry Sedgwick. It is not claimed that direct

and positive evidence has been adduced in support of this position. But it is insisted that such undue influence should be inferred from certain circumstances; mainly from the very intimate, confidential and fiducial relations which long subsisted between Mr. Sedgwick and Mr. Bristed, and from the fact that Mrs. Sedgwick was made one of the principal beneficiaries under the will here propounded. It has not been shown that he drafted this instrument, or advised with the testator about its form or substance, or knew of the fact that the deceased intended to make, or did make a will, during his visit to this country in the summer of 1871. Indeed, there is such an absence of proof, either direct or circumstantial, upon this subject, that it would be more of a guess than an inference, to deduce from the evidence a conclusion that Mr. Sedgwick exerted any influence, whatever, upon the mind of the testator, to bring about the preparation and execution of this will. If there be, however, proof of any influence at all, it is certainly not proof of such influence as the law deems "undue."

Says MILLER, J., in pronouncing the opinion of the court of appeals, in *Children's Aid Society v. Loveridge* (70 N. Y., 394): "In order to avoid a will . . . it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity that could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection, the desire of gratifying the wishes of another, the ties of attach-

ment arising from consanguinity, or the memory of kind acts and friendly offices.”

And the same court says, in *Cudney v. Cudney* (68 *N. Y.*, 152): “To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by deception, fraud or other improper means, that the instrument is not really the will of the testator.”

These are very recent expressions of the views of our highest judicial tribunal upon this subject. Tried by these tests, the claim that Mr. Sedgwick has been shown to have exerted undue influence upon the testator's mind is discovered to have no support. None of the numerous authorities which are noted on behalf of the contestant seem to me to be at odds with the decisions of the court of appeals above cited. Great stress is laid upon those cases which hold that, where one sustaining a fiducial relation to another, such as trustee, guardian, etc., is concerned in framing that other's will to his own advantage, the instrument ought to be closely scrutinized, and that there is indeed a presumption against its validity—a presumption strong or weak, according to circumstances. This is doubtless true. But it is only by arguing in a circle, that the ingenious counsel, who cites the cases referred to, makes them appear applicable to the case at bar. He first substantially infers the undue influence from the mere fact of the fiducial relations,

and then, having succeeded in thus establishing the existence of such influence, he claims the support of the judicial decisions which declare that the exertion of such influence, by one who holds a fiducial relation to another, is deemed suspicious in the eye of the law.

Third. There remains to be determined the question whether, at the time of executing his will, the testator was of sound mind and memory, within the meaning of our statute of wills. The evidence which bears upon this subject has been carefully considered, in the light of the able arguments of the respective counsel. Nothing which is relied upon by contestant suggests to my mind a doubt of the testator's sanity in 1871, unless it be the testimony of Dr. Blanche. That Mr. Bristed was insane in the early part of 1873 is not disputed by the proponents of this will. Indeed, it is conceded that, from that date until the summer of 1874, and again from the spring of 1875 to the summer of 1877, and at times thereafter, the testator was of unsound mind. It is claimed by the proponents that, in the interval between July, 1874, and March, 1875, and at some periods between August, 1877, and the date of his death, he was wholly or in part free from mental disease. On the other hand, the contestant insists that, during all those intervals, his insanity continued.

If this will had been executed after February, 1873, the date when the decedent became an inmate of an asylum in France, I should feel some embarrassment in determining the question of his testamentary capacity. But the evidence in the case does not justify me in finding that, at any time prior to the year 1873, the mental faculties of Mr. Bristed were seriously, if at all impaired.

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Suppose that he had died on November 12, 1871, the day after he made this will, and that, upon a contention as to his sanity, the same evidence had been produced which is now before me (exclusive, of course, of that portion which relates to his career subsequent to November 12th). If such a contingency had arisen, I do not see how it could have been fairly claimed that the question of the testator's mental capacity was in the least involved in doubt.

The only medical testimony, to which I need make special reference, is that of Dr. Blanche, of Paris, as he alone refers definitely to the probable mental state of Mr. Bristed before 1873. Dr. Blanche, who had made a specialty of the study and treatment of insanity, testified before a commissioner that he saw the decedent, for the first time, on February 18, 1873, at Paris, and caused him to be conveyed to a lunatic asylum; that Mr. Bristed remained there as a patient for a week, during which time he was under the frequent observation of the witness, who engaged him in long conversation as to the history of his life. It does not appear that he was ever seen by Dr. Blanche after February, 25th. The doctor states that, in his opinion, the decedent "was born under bad conditions of cerebral heredity, and had never been, even in his infancy, in a well balanced nervous condition, nor of a thoroughly sound judgment." The grounds of his conclusions he declared to be these: "From his infancy, John J. A. Bristed was subject to violent nervous crises (attacks), during which he uttered cries. He was never able to fix his attention continuously. He could not remember what he learned. At a later age, nevertheless, by means of travel, he was able to learn some languages,

but he said that he had entirely forgotten Italian. He had an extreme sensibility to music. He had habitually a certain vagueness in his mind. All these symptoms have increased since a severe typhoid fever with which he was attacked at Rome, in 1869. I have these particulars from Mr. John J. A. Bristed himself."

Dr. Blanche also testified that, aside from the information acquired by personal observations, he learned all that he knew of the testator from that gentleman himself and from his aunt, Miss Brevoort; that he would not undertake to state accurately what the testator's mental condition was in 1871, but from this examination in 1873, and from what was then learned of his antecedents, he believed that the testator "was never in a condition of complete enjoyment of his intellectual faculties, or of balance in his nervous system." Upon this evidence, the learned counsel for the proponent makes a criticism which seems to me well founded. It is to the effect that its whole value, so far as relates to the time when the will was executed, depends upon the truth of certain hypotheses, which have not been established as true by the evidence. The nature and extent of the information furnished to Dr. Blanche by Miss Brevoort, and which formed, in part, the ground upon which he based his conclusions, are not disclosed. But it is admittedly true that those conclusions are grounded, to some extent, at least, upon the declarations of the decedent, at or about the time when, according to Dr. Schule, to whose care he was committed when he left Dr. Blanche's charge, he was "not fully reliable in his statements, in consequence of his hypochondriacal anxiety."

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Several of these declarations, and among them some of the gravest importance, are utterly at variance with the weight of testimony as to the intellectual characteristics of the testator.

The opinion of a distinguished alienist upon the probable mental condition of a patient, years before such patient had come under his observation, though entitled to respect, should be carefully scrutinized before acceptance, in a case like the present, where the opinion is avowedly contingent upon the correctness of hypotheses which have not been established by the evidence. Indeed, with the exception of a single witness to whose testimony I shall presently refer, by the universal assent of all persons who testified as to Bristed's demeanor and conduct prior to 1873, he appears to have been entirely sane. Nearly twenty people were called to the stand, mainly persons who had been more or less intimate acquaintances of the testator at various periods of his life, and had apparently been afforded good opportunity and possessed good capacity for observing him. The attention of many of them was specially directed to the month in which the will was executed. They agreed that no acts or declarations of the testator, prior to his departure for Europe in 1871, seemed to them irrational.

Mrs. Caroline Carson was examined at Rome, under a commission issued out of this court, upon contestant's application. Mrs. Carson was an American artist, "fifty years of age and upwards," as she testified, and had been an acquaintance and friend of the Bristed family. Five direct interrogatories were addressed to her. It was only in answer to the last interrogatory—a general inquiry as to whether she knew other matters or things

which would benefit the contestant—that she gave any testimony whatever touching Mr. Bristed's mental condition. The apparent purpose of examining Mrs. Carson, as disclosed by every question except the last, was to ascertain what she knew of the relations between the decedent and Miss Cecile Bristed. In response to that general interrogatory, she deposed as follows: "I knew John Bristed to have been naturally good-natured and well disposed, and I cannot think that he would have been guilty of the acts of violence, malice and eccentricity which I have known him to commit; if he had been in his right mind. As a little child, he was gentle and sweet-tempered; but as he grew older, and ought to have become reasonable, he seemed to be bereft of reason. He would shriek like a wild Indian, and rush out of the house like a madman without any cause. He would play the piano for hours by day, and then get up in the dead of night and go on playing, always without sequence, like reading a newspaper sideways. On returning home at night, instead of ringing the bell, he would throw stones at the house. There were many other eccentricities too numerous to mention." She then specifies an occasion, in 1868, when decedent while in anger "railed invectives" at his father until she herself successfully "ordered him to hold his tongue," and concludes by saying: "I saw him in 1877, when he was acknowledged a lunatic. His talk was precisely the same I had always known it. He was sweet, kindly and perfectly inconsequent, as he had always been in his best moods."

It is unfortunate that this testimony was given in response to the general interrogatory, as no opportunity was afforded for cross-examination. The value of the

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evidence could be far more accurately measured, if the dates of the various occurrences referred to had been fixed, and if definite explanation had been afforded of matters which manifestly need explanation, in order to be thoroughly understood. The statement that "he would shriek like a wild Indian, and rush out of the house like a madman without any cause," might perhaps be fairly interpreted as a reference to decedent's general habits at some period of his life, and as such might be deemed very important. But, from the absence of any corroborative testimony as to the course of such behavior on the part of the decedent, it would appear that Mrs. Carson must have had in mind some special occasion, and the failure to fix its date greatly impairs the strength of the evidence. The same criticism applies to the statement that, "on returning home at night, instead of ringing the bell he would throw stones at the house." If the witness meant that, as a custom, or as a matter of frequent occurrence, the decedent, when desirous of gaining admission to his father's house at night, used to throw stones instead of ringing the door-bell, such eccentricity of conduct would deserve attention in determining his mental condition. But if, as may, perhaps, be inferred from the testimony of Mrs. Gorman, the only occasion when he threw a stone at the house was when he was locked out, and desired to attract attention that he might be let in, the circumstance is unworthy of serious consideration. There is the same deficiency as to date, and also a certain vagueness as to meaning, in the statement that Bristed "would get up in the dead of night and go on playing the piano, always without sequence, like reading a newspaper sideways."

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On the whole, therefore, I do not feel justified in attaching much importance to that part of Mrs. Carson's testimony which relates to the testator's mental capacity, especially in view of the opposing testimony of other witnesses.

A Mrs. Gorman lived for ten years as a servant in the house of Charles Astor Bristed, decedent's father. She was at Lenox, Massachusetts, when John visited his father there, in 1871. She says that "John sometimes forgot things and seemed a little nervous, or rather, would get into a passion about things that went wrong with him—about some little thing, his shirt perhaps." He sometimes seemed "queer," and by that she meant that he would "make a fuss over little things." He seemed very fond of his stepbrother, Charles, but liked to "make him yell." On cross-examination, the witness explained this by saying that Mr. Bristed would sometimes "pull at" her, and say he would strike her, so as to tease the baby, who was very fond of her.

Mrs. Geers was also employed as a servant in the house of Mr. Bristed, senior, in the summer of 1871, while John was in this country. She testified that "if things did not exactly suit him he would be a little nervous, and irritable, and cross;" that he was "a little forgetful at times;" that "his mother would bring things to his mind and find out that he would forget all about them." The frequency of this forgetfulness, or the nature of the matters brought by Mrs. Bristed to his attention, are not disclosed.

I have referred to this testimony, and to that of Mrs. Gorman, not because it seems very important, but for the sake of grouping the evidence of all the lay witnesses

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who were called to describe testator's character and conduct. The weight of the evidence in this respect is decidedly in favor of the proponent.

Many letters written by the decedent to his relatives and friends were introduced at the trial. I cannot agree with contestant's counsel, in the belief that they tend to establish that their author was insane. To my mind, they furnish strong proof to the contrary—such of them at least as bear earlier date than 1873. It is unnecessary for me to make a detailed reference to these letters. The briefs of counsel contain very able and interesting analyses of their contents. They are in the main clever and amusing, often instructive, particularly upon art subjects; at times poetical and eloquent, and in many instances enlivened by oddities and whimsicalities of thought and expression. But they do not seem to me to be tinged with insanity in the least degree.

The circumstance that certain collateral relatives of decedent, the descendants of his great-grandfather, have been afflicted with mental disease, throws little light upon the question—at what period of his life he himself first became its victim. Evidence that he had an hereditary tendency to insanity does not establish, of course, that such insanity was probably congenital, or that it declared itself at any particular stage of his career. And besides, the evidence does not disclose the existence of insanity among his immediate family or his lineal ancestry on either his father's or mother's side.

It only remains to consider contestant's claim that the mental unsoundness of the testator is indicated by the dispositions of the will itself. His nearest relatives, who were alive when the will was executed, were his

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father, his half-brother Charles, and his four aunts, Miss Brevoort, Mrs. Coolidge, Mrs. Kane and Mrs. Sedgwick (wife of Wm. E. Sedgwick, who has been already referred to). Miss Cecile Bristed was then an inmate of his father's house, and had been adopted as his daughter. The principal beneficiaries under this will are Miss Bristed, Mrs. Kane and Mrs. Sedgwick, who are respectively given three-sevenths, two-sevenths and two-sevenths of nearly the whole estate, amounting to about \$500,000. By his prior will of 1869, his aunts, Mrs. Coolidge and Miss Brevoort, were named as beneficiaries. They are not mentioned in the present will. In neither of these wills, is there any bequest to his half-brother, Charles, or, with an insignificant exception, to his father. The former, now about thirteen years of age, by his guardian, Mrs. Grace S. Bristed, the stepmother of the testator, is the sole contestant in this proceeding. There was much discussion, in the oral and written arguments addressed to me, touching the reasonableness or unreasonableness of the original will of 1869, and the wisdom or unwisdom of its revocation by the will of 1871, in view of certain changed conditions in the lives of his uncles and aunts. I have discovered no provision in either of those wills which ought not to be satisfactory to the court, if it suited the testator; and that, too, entirely aside from the question whether Miss Brevoort or Mrs. Coolidge had grown a little richer or a little poorer between 1869 and 1871. The testator had no wife, child, sister, brother, or mother. His father was a gentleman nearly seventy years old, and was possessed of means abundant for all his needs. His half-brother was a babe, entitled, in his own right, to half a million dollars, by the will of his

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great-grandfather, John Jacob Astor. His nearest relatives, aside from the two last-named, were his aunts. Courts are sometimes jealous, perhaps unduly jealous, of allowing testators to do what they will with their own. But I should have felt at liberty, under the peculiar circumstances of the present case, to sanction even an arbitrary selection by the testator, from among his aunts, of the particular one or ones whom he chose to enrich with his bounty.

There is nothing ungenerous, unjust, undutiful or eccentric about the provisions of this instrument; and it by no means exhibits any such violent departure from the natural course of human conduct as to suggest that it is the work of a disordered intellect. And so, upon all the evidence in this proceeding, I find, as matters of fact:

I. That the instrument here propounded was properly executed by John J. A. Bristed, deceased, as his last will and testament, on November 11, 1871; that, at the time of its execution, the said Bristed was of sound and disposing mind and memory, and was under no restraint or undue influence of any person.

II. And I find, as matter of law, that the said instrument is the last will and testament of said Bristed, and should be admitted to probate as such.

Decreed accordingly.

WETMORE v. CARRYL.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

WETMORE v. CARRYL.

*In the matter of the record of the will of APOLLUS R.
WETMORE, deceased.*

Unattested and unexplained alterations, appearing upon the face of a will, are presumed to have been made after execution. *It seems*, that the same rule prevails in this State,—differing from the English doctrine,—in respect to material changes *in a deed*.

The testator, by his will, gave a pecuniary legacy to each of two granddaughters, E. and A., the amount of which, as originally written, was \$5,000, but had been changed by erasures, and by marks in ink of a different color from that of the body of the will, to \$2,000. The will occupied only a single page of a printed form, at the center of which was a circular blot, three-eighths of an inch in diameter, apparently of the same ink as the alterations. The attention of neither of the subscribing witnesses was called to any alteration, by the testator; neither of them observed any defacement, erasure or other alteration, at the time of the execution; and there was no memorandum to the effect that the changes were made before signature. No direct evidence was given of the execution of the instrument in its altered state. C., one of the executors, testator's son-in-law, testified that, in a conversation with testator, some time in 1880, the latter spoke of having seen his lawyer, F., with reference to drawing up a new will, and stated that F. had suggested \$5,000, as the amount of a legacy to each of the granddaughters, to which testator had assented; that witness suggested one-twentieth of the estate as a suitable amount to each of them, to which testator assented; that, the next day, testator said, "I have arranged that in a different way; I have made it \$2,000." But the date of these conversations was not fixed relatively to the time of the execution, or even of the drawing of the will; and witness did not understand that they indicated more than a change of purpose. Testator had been a man of proved business capacity, exhibiting skill and precision in the management of affairs, but died aged eighty-four years. The will had been admitted to probate in 1881, and recorded as altered. On an application to change the record, by substituting the original for the altered form,—

Held, that to say that testator's declared purpose took shape in the alterations in question, before execution of his will, would be to hazard a guess rather than to draw an inference; that, upon the evidence, the altera-

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tions must be deemed to have been made after such execution; and that the application should be granted.

PETITION by Alethea R. Wetmore, a legatee, to rectify the record of the will of decedent, which was admitted to probate February 16, 1881; opposed by Charles E. Carryl and George C. Wetmore, executors. Further facts appear sufficiently in the opinion.

JOHN M. MITCHELL, *for petitioner.*

E. L. FANCHER, *for executors.*

THE SURROGATE.—The testator, by the first clause of his will, gave a legacy to each of two granddaughters, Edith and Alethea. The amount of that legacy, as the same now appears on the face of the instrument, is \$2,000. It is discovered, however, upon inspection, and is indeed an admitted fact, that, by the will as it was originally written, the bequest was fixed at \$5,000, instead of at \$2,000. According to the uncontradicted testimony of Mr. George C. Wetmore, this change, which will presently be described in detail, was made by the decedent himself, and in his own handwriting. The question whether such change was made before or after execution is the one at issue in this proceeding. If before, the will must stand as it now reads, and as it has been recorded, with a legacy to each of the grandchildren of \$2,000. If after, the record must be amended, and the bequest to the grandchildren be declared to be \$5,000, as the same was originally fixed.

The will in question is on a printed form, and is very brief, occupying but a single page of paper. With the few exceptions hereafter noted, it is written in a very

bright, distinct violet ink, which strikingly contrasts with the black ink used in making the alteration. The word "five," about an inch and a half from the top, has been changed to "two" by erasing the "F" and substituting a "t," and by writing an "o" over the "e." The letters "i" and "v" have been in no way disturbed, except that a faint and partly erased mark is to be seen, where, probably, the dot of the "i" originally appeared. The "i" and "v," in "five," when taken together, make the "w" in "two." Following the word "two" are the words "thousand dollars each." Over the word "thousand" is a small cross. A similar cross appears, in line with it, in the margin, and directly under that are the figures 2000, followed by a dollar sign. Nearly in the center of the page is a circular blot about three-eighths of an inch in diameter. This, too, is in black ink. So are the words "twenty-eighth," which appear in the date, and so is the signature of the testator. No evidence is before the court, tending to show whether the alteration, the figures, the blot, the date and the signature were or were not made with the same ink. By my own inspection of the document, I am led to believe that the ink of the blot is probably the same as that of the alteration and the marginal figures, and probably different from that of the date and signature. This is a circumstance of some consequence, though not of vital importance, in determining the question at issue. The alteration is unattested—no memorandum concerning it appears upon the face of the paper. The attention of neither of the subscribing witnesses was called to it by the testator, and neither of them observed any erasure, alteration, inter-

lineation or defacement in the instrument at the time it was executed.

Now what, if any, presumption arises from this state of facts, as to the time when the alteration in dispute was made? It is a well-known doctrine of the English law that, so far as relates to deeds, changes, even though material and important, are presumed to have been made before execution. This presumption seems to have originally asserted itself as a sort of corollary to the presumption of innocence. Almost any willful material alteration in a deed, after its execution, would constitute a criminal offense, unless unexplained. Alterations, therefore, were regarded as having been made before execution. Their very existence would create a presumption that some person had committed a crime. The only logical mode of escape from a situation deemed repugnant to the law was found in setting up a presumption, that unexplained alterations must have preceded execution.

The courts of this State, however, have not followed the English doctrine in respect to material changes in a deed, but hold that the party claiming under it must explain the alterations (*Herrick v. Malin*, 22 *Wend.*, 388; *Smith v. McGowan*, 3 *Barb.*, 404; *Acker v. Ledyard*, 8 *Id.*, 514).

As to wills, the uniform decisions of the English courts, since the passage of the Victoria statute (1 *Vict.*, § 21, ch. 26), have been to the effect that all unattested alterations are presumed to have been made after execution. The leading case is that of *Cooper v. Bockett*, decided by the privy council in 1844 (4 *Moore's P. C. C.*, 419). The question before that tribunal was whether the will should be admitted to probate, with or without cer-

tain changes apparent on its face. Lord BROUGHAM pronounced the opinion. He said that there were two questions: "First. At what time were the alterations made? Were they made before or after the attestation? Secondly. If that point cannot be ascertained, is the instrument to be read as it originally stood, or are the alterations to be admitted as a parcel of it?" Reviewing the testimony of the subscribing witnesses (which, it may be said, in passing, was similar to that given in the present case), Lord BROUGHAM said: "Can anything be more clear than that we ought to know whether the testator executed, and the witnesses subscribed, this will as it now exists, or a former will; for that is the precise question before us. . . . Whoever propounds an instrument which, on the very face of it, exhibits grounds of great doubt, must remove those grounds and clear up the doubts." Probate was granted to the instrument in question, as it originally read, before the alterations. This decision was followed in 1848, in the case of *Lushington v. Onslow* (6 *Notes of Cases*, 183).

In 1851, the question came before the court of queen's bench, in the case of *Doe dem. Shallcross v. Palmer* (15 *Jur.*, 837). Lord CAMPBELL pronounced the opinion of the court, declaring that certain unattested alterations in a holograph will must be presumed to have been made after its execution. He expressed his approval of the decision in *Cooper v. Bockett*, *supra*, and commented upon the dangerous facility which would be given to a testator, unless that doctrine were upheld, to alter his will after execution. *Greville v. Tylee* (7 *Moore P. C. C.*, 326) was decided in 1851, by the privy council, on an appeal from the prerogative court of Canterbury. In that

case, as in the present, there was an erasure apparent on the face of the will, and over that erasure new matter had been written. Says Dr. LUSHINGTON, the member of the council who pronounced its opinion : " We apprehend it to be now settled that whoever alleges such an alteration to have been done before the execution of the will is bound to take upon himself the *onus probandi*."

In a case which was before the court of probate in 1858 (In the goods of Elizabeth Stone James, 1 *Swab. & Trist.*, 238) the question arose, as to the effect of erasures so complete as to baffle all efforts for ascertaining the obliterated words. In the judgment of the court, the presumption was that the erasures had been made subsequent to execution, and it was decreed that, so far as related to the parts erased, probate should be had in blank. Two years later, the same will was before the vice-chancellor, in the case of *Williams v. Ashton* (1 *Johns. & H.*, 115). It appeared that, over the erasures, certain provisions had been written in the handwriting of the testatrix. By the evidence of the attesting witnesses, it also appeared that the testatrix told them, at the time of the execution, that she had made some alterations in her will. The will was so folded, however, that they did not see what the alterations were. The vice-chancellor mildly criticises that form of stating the rule of law which the courts had sanctioned. He thinks it inaccurate to say that alterations in a will must be presumed to have been made at one time or at another. It is more correct, in his view, to state that the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury might infer that the alteration was made before

the will was executed. He adds that the rule of law as to deeds has no application to wills. "There is no crime," he says, "in a testator choosing to make alterations in his own will, but he cannot reserve to himself a power of making future testamentary gifts by unattested instruments. . . . I apprehend the rule is that those who propound a doubtful instrument must make the doubt clear." (See, also, *Gann v. Gregory*, 22 *L. J., Equity*, 1059; *Simmons v. Rudall*, 1 *Simons, N. S.*, 115; *In the Goods of White*, 30 *L. J. [N. S.]*, 55, *P. M. & A.*).

It is claimed by counsel for the executors that recent English decisions upon this question are not precisely in point, as they are founded upon a statute which essentially differs from our own, and that, before the enactment of that statute, a different rule obtained in England. It is true that some early decisions are reported, which are seemingly inconsistent with the doctrine of *Cooper v. Bockett, supra*. But, upon careful examination, this inconsistency is found to be more apparent than real. These decisions, so far as I have been able to discover, relate exclusively to wills of personal property; now, prior to the 1st Victoria statute, no special formalities of execution were essential to the validity of such a will. Any holographic paper, for example, though unsigned and unattested, was allowed the force and effect of a will, if it disclosed a testamentary intention on the part of the decedent. Such being the case, alterations in a will of personal estate might be made by a testator at his pleasure, without affecting its validity. The only question for the determination of the court was the question whether such alterations were testamentary, or only

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deliberative in their character. For this purpose, an inquiry as to the time when such alterations were made, and as to the attendant circumstances, was manifestly desirable, and indeed essential. It might thus be ascertained whether they were made by the testator himself, and whether they evinced a testamentary purpose on his part, or were only intended as memoranda for future consideration. If, in executing a will as to personalty, he had chosen to adopt some such formalities as the law made essential in devises of real property, then, of course, the appearance of any alteration, on the face of the instrument, necessitated an inquiry whether or not it was present there at the time the instrument was executed. But, unless the change affirmatively appeared, under all the circumstances, to have been made after execution, the courts were naturally very much disposed to hold that it had been made before, prompted as they were by a desire to give effect to a testator's last expressed wishes, which were not then required to be authenticated in any particular form.

The Wills act of 1st Victoria, however, provided that the same formalities should be required in the execution of wills of personal as in those of real estate, and declared (1 *Vict.*, § 21. ch. 26) "that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect (except so far as the words or effect of the will before such alteration shall not be apparent), unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will ; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the

subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will."

It will be observed that the above quoted provision which requires a special memorandum of alterations, relates only to such alterations as are made after execution. The statute is silent as respects prior alterations, and, so far as they are concerned, no memorandum or special attestation is made necessary. It would seem, therefore, that the terms of this statute do not differ so widely from our own, as to make inapplicable to the present case the English decisions to which reference has been made. These decisions have been fully reviewed, because of the singular infrequency with which the question here at issue has been discussed in our American courts.

The case of *Van Buren v. Cockburn* (14 *Barb.*, 118), involved the validity of a holographic will. The trial judge had declined to charge that certain alterations should be presumed to have been made before execution. In this he was sustained by the general term of the supreme court, and also in his statement to the jury that "although ordinarily, when all the requisites of the statutes had been complied with in the execution of the will, the presumption of law is that the instrument produced is the will thus executed, yet when it is made to appear that the will has been altered or changed, the presumption that it is the same paper which was executed disappears (see also *McPherson v. Clark*, 3 *Bradf.*, 93; *Estate of Prescott*, 4 *Redf.*, 178; *In re Tonnele*, 5 *N. Y. Leg. Obs.*, 254).

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Upon the authorities that have been cited, and the arguments by which they are supported, I should feel bound to hold, in the absence of any evidence other than that to which reference has thus far been made, that this will ought to be recorded as it was originally written.

The legal effect of the evidence, not yet alluded to, is rather to strengthen than to weaken the conclusion that the execution preceded the alteration. I have already intimated that the blot is apparently in the same ink as the alteration. Its position on the page suggests the probability that it was made at the same time. Mr. Carpenter, one of the subscribing witnesses, states that when he wrote his name on the paper no blot was seen by him, and he declares his very positive belief that, if such blot had been then upon the page, he would have observed it; that his experience in connection with the preparation of formal papers was such, that no mark so conspicuous would probably have escaped his attention. Mr. Stevens, the other subscribing witness, gives substantially the same testimony. Both of them swear, also, that they did not perceive any marks of alteration on the face of the will, though it was spread out upon the table before them, and though no part of its very brief contents was hidden from their view.

Mr. Carpenter, who testifies cautiously, says that his inspection of the paper was not sufficiently particular to justify him in swearing that the alterations might not have been already made, but the testimony of his fellow-witness, in that regard, is much more positive. There is no evidence, on the other hand, which directly tends to prove that the instrument was executed in its altered state.

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The only evidence bearing indirectly upon that matter is the statement of Mr. Carryl, the son-in-law of the decedent, and one of his executors. He says that, on the evening of some day, in 1880, late in the spring or early in the summer, in the month of May as he believes, he had a conversation with the testator, who told him that "he had seen Judge Fancher with reference to drawing up a new will," that the judge had suggested his giving to Edith and Alethea \$5,000 each, and that he had consented to do so. Mr. Carryl said that he thereupon suggested to the decedent the propriety of giving to each of these ladies one-twentieth of his estate, for reasons which were specified, and that the decedent assented to that suggestion, and asked him to draw a will which should be consonant with that scheme. Mr. Carryl declined to do so. The next morning, Mr. Wetmore said to him: "I have arranged that in a different way; I have made it \$2,000." The two then had some conversation in reference to the persons who would be most desirable witnesses to such will as Mr. Wetmore might wish to execute. Mr. Carryl advised that the witnesses should be procured at the Juvenile Asylum, of which institution Mr. Wetmore was president.

This is the substance of Mr. Carryl's testimony, as to which it may be remarked: 1. It does not show, and indeed no other evidence shows or tends to show, whether, at the time of these conversations between Mr. Wetmore and himself, any person had touched pen to paper in the preparation of this will. Mr. Carryl never saw this instrument, executed or unexecuted, until after the testator's death. Mr. Wetmore did not tell him that it had been drafted, or make any statement which would

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seem to have involved the fact that the paper had then come into existence. In his own words, Mr. Carryl "did not know that any will had been drawn at all." Mr. Wetmore simply told him that "he had seen Judge Fancher with reference to drawing up a new will." The evidence leaves us utterly in the dark, as to the time when the will now under discussion was prepared and put into the hands of the testator.

2. Mr. Carryl is unable to fix the date of these conversations, either absolutely or with relation to the day when this instrument purports to have been executed. It does not appear, from his testimony, or from any other evidence, whether Mr. Wetmore's visit to the Juvenile Asylum, and the attestation of this will, preceded or succeeded those conversations.

3. Mr. Carryl distinctly testifies that Mr. Wetmore's statement—"I have arranged that in a different way; I have made it \$2,000"—did not convey to him, at the time, the idea that Mr. Wetmore had made a physical alteration on the face of a written paper. On the contrary, he interpreted the remark as a mere declaration of a change of purpose on Mr. Wetmore's part. There is not enough force in this testimony to overcome that of Carpenter and Stevens, especially when we consider the support which the latter receives, as we have already discovered, from legal presumption. There seemed to me, at first, to be some force in the suggestion that, from the proved business capacity of Mr. Wetmore, it might be fairly inferred that he knew the requirements of law in relation to wills, and would not have been likely to alter this paper after it had been formally attested by the witnesses. But there are incidents connected with the ex-

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ecution of this instrument which seriously impair the force of this suggestion.

1. It has been incidentally disclosed in this proceeding that neither of the subscribing witnesses saw the testator sign, or heard him acknowledge his signature.

2. The attention of the witnesses was not called by the testator to the alterations, nor is there any memorandum to the effect that such alterations were made before signature.

3. The fashion of the alteration itself—indeed, the very fact of the alteration—shows that no inference can be safely drawn from the supposed business precision and caution of the testator. It would be strange, indeed, if he had possessed, at the advanced age of eighty-four, the same skill and accuracy in the management of affairs which he had formerly exhibited. The argument, therefore, against the antecedent probability of his making these alterations in an executed instrument, does not seem to me very forcible. To my mind, it would antecedently have seemed quite as unlikely that, after making these conspicuous and important changes on the face of an instrument, so brief that he might have caused it to be neatly copied in ten minutes, he should yet have executed it in its defaced condition, and thus almost inevitably have laid the foundation for this controversy. I think that, at some time before he died, Mr. Wetmore made, with his own hands, the alterations in this instrument; but that he did it before execution, I am not persuaded by the evidence. His testamentary designs, as respected his grandchildren, are shown by Mr. Carryl to have been vague and inconsistent. Within the space of a few hours, he announced his intention to give them at first

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\$5,000. each, then one-twentieth of his estate, then \$2,000 each. This last purpose seems to have found expression in the alteration; but to say that his purpose took that shape, before Carpenter and Stevens witnessed the will, is to hazard a guess rather than to draw an inference.

The motion to change the record herein is granted, as prayed for in the petition.

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

EFFRAY v. FOUNDLING ASYLUM.

*In the matter of the probate of the will of FELIX EFFRAY,
deceased.*

The testator, by his will, executed on the day before his death, gave certain legacies, as follows: by clause (7), "unto St. John's Guild, a corporation created by and existing under the laws of the State of New York, the sum of \$5,000;" by clause (8), a legacy to the "Societe Française des dames de l'Eglise de St. Vincent de Paul a New York," an unincorporated association; by clause (9), "unto the person acting as the treasurer for the time being, meaning the treasurer, if there be one, of the Foundling Asylum for Babies, Lexington avenue and Sixty-eighth street, New York city, to be applied to the uses of said asylum, the sum of \$3,000;" by clause (10), a legacy to the treasurer of the House of the Good Shepherd. The St. John's Guild was organized under the act for the incorporation of benevolent, etc., societies, *Laws* 1848, ch. 319, which invalidates a gift to any corporation formed thereunder, contained in a will executed less than two months before the testator's death. The ninth clause described an institution not existing; but there was located, at the place mentioned, a corporation organized under the act of 1848, named "The Foundling Asylum of the Sisters of Charity in the City of New York." The validity of these bequests having been put in issue, *Held*,

1. That clause (7) was void under the act of 1848.

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2. That clause (8) was valid.
3. That clause (9), though not void for uncertainty as to the legatee, was void under the act of 1848, it being not competent for the testator to evade the policy of that statute, by the simple device of making the gift to an individual, and the bequest being, in legal effect, one to the last mentioned foundling asylum; and that clause (10) was void, for a like reason.

UPON proceedings for the probate of decedent's will, Marie Emelie Celestine Effray, an infant daughter of decedent, by her special guardian, expressly put in issue the validity of certain bequests, pursuant to Code Civ. Pro., § 2624. The facts appear sufficiently in the opinion.

W. B. WINTERTON, *for executors.*

JOSIAH SUTHERLAND, *special guardian for M. E. C. Effray.*

DEVLIN & MILLER, *for the Foundling Asylum, etc.*

THE SURROGATE.—On January 2, 1882, decedent executed a will, which has been propounded for probate. It contains certain dispositions of personal property, the validity and effect of which have been put in issue. By section 2624 of the Code, it is made my duty to pass upon this issue, before admitting the will to probate.

The question arises under *Laws* 1848, ch. 319, § 6, which provides that "no devise or bequest to any corporation formed under the act shall be valid in any wise, which shall not be made and executed at least two months before the death of the testator." Mr. Effray died on the day following the execution of the will. It is not disputed, therefore, that any bequests which are given to corporations, formed under the act of 1848, are void.

1. The testator, by the seventh clause of his will,

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bequeaths "unto St. John's Guild, a corporation created by and existing under the laws of the State of New York, the sum of \$5,000." It appears by the evidence that St. John's Guild is a corporation established under the act of 1848. The bequest to that institution is indisputably void.

2. By the ninth clause of his will, the testator bequeaths "unto the person acting as the treasurer for the time being, meaning the treasurer, if there be one, of the Foundling Asylum for Babies, Lexington avenue and Sixty-eighth street, New York city, to be applied to the uses of said asylum, the sum of \$3,000." At the corner of Lexington avenue and Sixty-eighth street, there is no such institution as the Foundling Asylum for Babies; but evidence has been produced before me that, at the place indicated, there are buildings occupied by a corporation established under the law of 1848, and called the Foundling Asylum of the Sisters of Charity in the City of New York. That institution is the only one at or near the premises specified, and I find it to be the one which the testator designed to make the object of his bounty (*Lefevre v. Lefevre*, 59 *N. Y.*, 434; *New York Institution for the Blind v. How's Executors*, 10 *N. Y.*, 84; *Hornbeck's Executor v. American Bible Society*, 2 *Sandf. Ch.*, 133).

It is urged, on behalf of the infant next of kin, that the foregoing bequest, like that to St. John's Guild, is void. It is claimed, on the other hand, by the foundling asylum, that the bequest is not to the corporation, but to the individual, who, at the time of the testator's death, might be the treasurer of the institution, if it should

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then have a treasurer, and, if not, to the individual who should be acting as such treasurer.

In *New York Institution for the Blind v. How's Executors* (10 *N. Y.*, 84), and in *Chamberlain v. Chamberlain* (43 *N. Y.*, 437), a bequest to trustees of certain corporations was held to be in legal effect a gift to the corporations themselves. So, too, in *Hornbeck's Executor v. American Bible Society* (2 *Sandf. Ch.*, 133), a legacy to certain treasurers of various societies was held to be a gift to those societies. And in *Manice v. Manice* (43 *N. Y.*, 314), a bequest of a certain sum "to the treasurer for the time being of Yale College, which sum I request the trustees of said college to invest," etc., was regarded as a bequest to the college.

It seems to me that the present case is clearly within the scope of the foregoing decisions. The claim that the gift is to the individual or person who may be treasurer at the testator's death, and that the reference to such person as treasurer was only by way of description, might possibly have some force, but for the words "to be applied to the uses of said asylum." In view of that clause, it cannot be claimed, and indeed is not sought to be claimed, that the treasurer could treat the bequest as a personal legacy to himself. But it is argued that the phrase, "to be applied to the uses of said asylum," may be construed as if it read "applied to such uses as the asylum applies its moneys;" that is, that the will makes the person, who is treasurer, a trustee for a class of beneficiaries which he may select, and which must be similar to the class for whose care and maintenance the Foundling Asylum was instituted.

• However commendable may have been the purpose of

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the testator, I cannot think that, by a device so simple, the manifest policy of the statute has been successfully evaded, and the intent of its provisions frustrated. It seems clear to me that this bequest must be declared invalid, as in legal effect a bequest to the Foundling Asylum. For the same reason, the tenth clause of the will, whereby the testator gives a similar legacy to the treasurer of the House of the Good Shepherd, must be adjudged void.

The eighth clause would also be invalid, if the "Society Francaise des dames de l'Eglise de St. Vincent de Paul a New York," was a corporation established under the act of 1848; but it is shown to be an unincorporated society, and no grounds have been urged against the validity of this bequest. I hold that is valid.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

DENNETT v. TAYLOR.

*In the matter of the paper propounded as the will of
EDWIN C. TAYLOR, deceased.*

The subscription of a testator, and the signatures of the attesting witnesses, must be "at the end of the will."

In order to incorporate a paper into a will, by reference, the testator must distinctly describe it, and it must be then in existence.

Partial probate cannot be granted, where several writings are propounded as a will, unless the matter rejected appears to have formed no part of the testamentary purpose.

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The paper propounded as decedent's will covered the first and second pages of a sheet of paper, the former of which, being partly printed and partly in decedent's handwriting, contained the introduction, a direction to pay debts, an appointment of executors, one dispositive clause followed by a blank of four inches, the in testimonium and attestation, and the signatures of decedent and witnesses. The dispositive clause bequeathed certain amounts "as hereinafter named," without further explanation. On the second page were twenty lines in decedent's handwriting, giving certain legacies to persons and for purposes specified, and disposing of "all the balance" of his assets for the benefit of his ward, without signature. At the time of execution, the subscribing witnesses did not see the writing on the second page, except as indistinctly appearing, through the sheet, upon the first page; and there was no evidence that such writing had then taken its latest form, nor that decedent, in the words "hereinafter named," had reference thereto, nor that the property sought to be bequeathed on the second page was or was not the same as that mentioned on the first. On application for probate, *Held*,

1. That the two pages could not be admitted as a will, the testator and witnesses not having signed "at the end" thereof; and the theory of an incorporation of the second into the first page, by reference, being untenable because, in order to such a result, the testator must distinctly describe an existing paper.
2. That partial probate, to wit, of the first page, could not be granted, it being clear that this page did not express the full purpose of the testator.

The decision in *Conboy v. Jennings*, 1 T. & C., 623,—distinguished.

APPLICATION for the probate of a paper propounded as decedent's will, by Francis F. Taylor, named as executor therein; opposed in behalf of Walker Dennett and Alexander Taylor, infant legatees. The facts appear sufficiently in the opinion.

BUSHE & CLARK, *for proponent*.

GEO. G. DE WITT, JR., *special guardian for contestants*.

JAMES B. SHERIDAN and F. G. Dow, *special guardians for infants*.

WILLIAM C. SANGER, *for Eugene E. Oudin*.

THE SURROGATE.—An instrument purporting to be the

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will of Edwin C. Taylor has been offered for probate. It covers the first and second pages of a sheet of paper. The first page reads as follows:

"In the name of God, amen. I, Edwin C. Taylor, of the city and county of New York, being of sound and disposing mind and memory, and considering the uncertainty of this life, do make, publish and declare this to be my last will and testament, as follows: First. After my lawful debts are paid, I give the amount of my paid-up policy with the Mutual Life Insurance Company and the sum payable from the Jewelers' League as hereinafter named. I hereby appoint Charles E. Morris and Francis F. Taylor to be executors of this my last will and testament, hereby revoking all former wills. In witness whereof, I have hereunto subscribed my name, and affixed my seal, the ninth day of November, in the year of our Lord one thousand eight hundred and eighty. EDWIN C. TAYLOR. (E. C. T.)

"Subscribed by Edwin C. Taylor, the testator named in the foregoing will, in the presence of each of us, and at the time of making such subscription the above instrument was declared by the said testator to be his last will and testament, and each of us, at the request of said testator and in his presence and in the presence of each other, sign our names as witnesses thereto, at the end of the will. HAYWARD S. COZZENS, residing 224 East Fifteenth street. JOHN TAYLOR, residing Newark, N. J."

That portion of the paper propounded as decedent's will, which has just been quoted, is partly in print, and partly in his own handwriting. The introduction, the clause relating to the appointment of executors, and the testimonium and attestation clauses, are in print. After

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the words "hereinafter named," and in the place where the dispositive provisions might be expected to appear, there is a space of about four inches which is utterly blank.

The printed matter following this blank space, together with the signatures of the decedent and the subscribing witnesses, occupies the remainder of the page.

Upon the reverse side, commencing at the top and continuing for twenty lines, there appears in the testator's handwriting the following :

"I desire that a demand note for one hundred dollars in the hands of Mr. C. T. Cook, of Messrs. Tiffany & Co., be paid, and that one hundred and twenty-five dollars be paid to Mr. M. E. Harris, to redeem my watch and jewelry. I wish the sum of two hundred dollars expended in enclosing and otherwise improving the lot in Greenwood cemetery, where my mother and father are buried, and where there is room for my body. I give one hundred dollars each to M. C. E. Morris and Francis F. Taylor, to buy them souvenirs. All the balance of my assets I wish paid into the hands of my executors, for the benefit of my ward, Alexander Taylor, if they will accept the charge ; if not, the money may be paid to the said Alexander Taylor, who will, from the date of receiving it, assume charge of his own affairs. My piano and stool I leave to Walker Dennett, and all my other personal effects to my ward Alexander Taylor."

Upon the foregoing facts two questions arise : 1st. Are both the first and second pages entitled to probate, as together constituting Mr. Taylor's will ? 2d. If the second page must be rejected, has the first a just claim to be upheld ?

First. It is provided by our Wills act (2 *R. S.*, 63, § 40; 3 Banks' 7 ed., 2285), that both the "subscribing" by the testator and the "signing" by the witnesses must be "at the end of the will."

Our statutory requirements in this respect are more stringent than those of other American States, with very few exceptions. In most of them, the signatures have equal force and effect, whether they appear in one part of the will or another.

But it is one of the essential formalities, in the execution of a will in this State, that the signatures both of the testator and the attestors be placed "at the end." Now, where is the "end" of the instrument here offered for probate? Surely not where the signatures appear, unless one can be said to arrive at the end of a thing, before he gets through with it. The end has come when there is naught beyond, and not till then. The very ground, indeed, upon which it is urged, that the second page of this paper should be admitted to probate, is that the first page disclosed only in part, and in insignificant part, the purpose of the testator. Now, it is upon that page that the signature appears. If it is there that the will ends, then all that follows goes for naught; on the other hand, the whole instrument manifestly goes for naught, if it ends on the second page, for there it is not signed as the law demands.

That I have not too strictly construed the terms of this statute appears from an examination of the authorities. There are few American cases which throw light upon the matter, but the English decisions are numerous and positive.

The act of 1 Victoria (c. 26), provided that a will

should "be signed at the foot or end thereof by the testator." This act continued in force until it was amended by the act of 15 & 16 Victoria, ch. 24. It would be profitless to specify here the nature and extent of the changes made by the statute last named, but those changes were so many and so sweeping that the decisions of English courts, upon cases arising since 1852, have little, if any direct bearing upon the matter under discussion. On the other hand, the decisions for fifteen years prior to that date are much to the purpose, as the language of our statute is substantially the same as that of the English Wills act before its amendment.

The rejection of the second page of the paper here propounded is fully supported by : In Goods of Birkett (6 *Notes of Cases*, 597); In Goods of Parslow (5 *Id.*, 112); Willis v. Lowe (5 *Id.*, 428); In Goods of Tookey (5 *Id.*, 386); In Goods of Martin (2 *Id.*, 385); In Goods of Howell (2 *Curteis*, 342); In Goods of Milward (1 *Id.*, 912); Smee v. Bryer (6 *Notes of Cases*, 20, 406, and page 41 of supplement).

In the case last cited, the court (privy council) says : "The question is whether this will is signed by the testatrix at the foot or end, according to the true intent and meaning of the statute. Now, forms are required for the purpose of preventing spurious wills. It may happen, even frequently, that genuine wills—*i. e.*, wills truly expressing the intention of the testators—are made without observation of the required forms ; and whenever that happens, the genuine intention is frustrated by the act of the legislature, of which the general object is to give effect to the intention. The courts must consider that the legislature, having regard to all probable cir-

cumstances, has thought it best, and has therefore determined, to run the risk of frustrating the intention sometimes, in preference to the risk of giving effect to or facilitating the formation of spurious wills by the absence of forms. . . . When questions arise whether the prescribed forms have been observed or not, and such cases must frequently occur, it seems to be the duty of the courts to construe the enactment according to the plain rules of common sense: not to strain the simple meaning of the words, or to be astute in giving special constructions on particular occasions, for the purpose of evading the application of the rule, where its application may seem to us to frustrate or defeat the intention of testators in particular cases."

In *Owens v. Bennett* (5 *Harr.* [*Del.*], 367), after the testator's signature appeared: "N. B. I give and bequeath to Aaron Owens all my personal property." This was written by the express directions of the testator, at the same time as the main part of the will, and before the instrument was executed. But the court held that the part following the *nota bene* must be rejected, and commented upon the mischief which would ensue, if the signatures of the testator and the subscribing witnesses should be suffered to cover such parts of the document as were below the signature. To the same effect are *Glancy v. Glancy* (17 *Ohio St.*, 134); *Hays v. Harden* (6 *Penn. St.*, 409); *M'Guire v. Kerr* (2 *Bradf.*, 244); *Sisters of Charity v. Kelly* (67 *N. Y.*, 409).

In the case last cited, the testator had signed his name in the middle of that clause in his will which named his executors. This immediately preceded the testimonium clause, and came after all the dispositive

portions of the instrument. The court of appeals held (reversing the general term of the supreme court), that the execution was not in accordance with the statute, because the signature was not at the end of the will. See, also, *In the Goods of Dearle* (39 *L. T. Rep.*, 93), and *Sweetland v. Sweetland* (4 *Swa. & Trist.*, 6).

It has been urged, by counsel for the proponent, that the writing on the second page can be treated as if it were a separate and distinct paper, to which the first page makes reference, and which is thereby incorporated into the will.

This position, however, is untenable for several reasons: 1st. Because the statutory requirements already discussed cannot be evaded by so simple a device. 2d. It has been repeatedly held that, if a testator refers to another paper, he must, in order to make such paper part of his will, distinctly describe it, and it must be then in existence (*Sisters of Charity v. Kelly*, *supra*; *Chambers v. McDaniel*, 6 *Ired. Law*, 226; *Pollock v. Glassell*, 2 *Gratt.*, 439; *Phelps v. Robbins*, 40 *Conn.*, 271). But we are entirely in the dark, as to whether this writing had taken the precise form which it now has, at the time the witnesses subscribed their names. They did not see it, except as it was partly and indistinctly shown upon the opposite side of the sheet. 3d. And besides, it is by no means clear that any of the matter upon the second page is what the testator had in mind, when he used the words "hereinafter named," upon page first.

It will be remembered that the subject of the gift, referred to at the outset, is the amount of the decedent's paid-up policy with the Mutual Life Insurance Com-

pany, and the sum payable by the Jewelers' League. Now it does not appear, on the face of this paper, or by any extrinsic evidence, whether the property sought to be bequeathed is or is not the same as that referred to on the first page.

Second. It is claimed that, even if this paper is not entitled to probate as a whole, the first page may be taken as the will of the testator. I am persuaded, however, that the instrument must be utterly rejected. The subscribing witnesses say that, at the time of its execution, there was writing upon its second page. It is plain, therefore, that the portion on the first page did not express the entire will of the testator. I have been able to find no case in which, under circumstances like these, partial probate has been granted. In the case of *Glancy v. Glancy (supra)*, it clearly appeared that the addition was made before the execution; yet the court rejected the entire will, upon the ground that the part preceding the signature did not express the full purpose of the testator.

In the case of *Hays v. Harden (supra)*, the court says: "The argument that all which precedes the signature, having once been formally executed, should remain stable and yet the additional line should be rejected, is plausible but unsound. It is evident that the testator considered the whole to be one will. We have no reason to believe he would wish any part to stand, if the whole did not. It is better that an informal addition should operate as a statutory revocation of the whole, than that a plain injunction should be frittered away by exceptions."

In the case of the *Sisters of Charity v. Kelly (supra)*,

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it was held that not only should the part following the signature be rejected as not properly executed, but that such improper subscription invalidated the entire instrument.

The case of Conboy v. Jennings (1 T. & C., 622), is not in conflict with these decisions. Two pages were there held to constitute a will, to the exclusion of a third page, upon which something had been written by the testator before the instrument was executed. The court found that the matter upon the third page was not intended by the testator to form any part of his will, but that according to his understanding and that of the witnesses, the instrument came to an end on the second page.

I have found no other case that furnishes even an apparent exception to the rule which would shut out this entire instrument.

The paper propounded as the last will and testament of Edwin C. Taylor must therefore be denied probate altogether.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

SECOR v. SENTIS.

In the matter of the judicial settlement of the account of CHARLES G. SENTIS and WILLIAM LOCKWOOD, executors, etc., of JAMES SIMONSON, deceased.

The statute, 2 R. S., 93, § 58, providing that, upon settlement of an executor's account, "the Surrogate shall allow to him" compensation, etc., is not mandatory. Its object was to furnish a definite and simple rule as to amount, to be applied in all cases where there should be need for

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the application of any rule at all; and not to restrict testators either from fixing compensation to the exclusion of statutory allowances, or from forbidding any compensation whatever.

It seems, that section 2737 of the Code of Civil Procedure, forbidding an allowance to an executor for whom the will provides a specific compensation, unless he renounces the latter, is not equivalent to a declaration that such a renunciation will in all cases, entitle him to statutory commissions.

The testator, by his will, granted to one of two executors, and to the wife of the other, one-half of the residuum, and declared that the executors should receive no compensation or fees, for their services in settling the estate. Accordingly, on their final accounting, the executors asked for fees. *Held*, that they could not have any.

Halsey v. Van Amringe, 6 *Paige*, 12; *Dakin v. Demming*, *Id.*, 95;—explained.

APPLICATION, by executors, for commissions upon the judicial settlement of their account. Leonora Secor and others, infant legatees, appeared on the settlement. The facts appear sufficiently in the opinion.

KELLY & MACRAE, *for executors.*

R. B. GWILLIM, *special guardian for Leonora Secor.*

A. J. DITTENHOEFER, *for other infant legatees.*

THE SURROGATE.—The testator declared by his will that his executors should receive no compensation or fees, for their services in settling his estate. They are now about to make their final accounting, and they ask the allowance of the ordinary commissions, despite this inhibition of the will. They claim, indeed, that they are absolutely entitled under the statute, and that the Surrogate has no discretion in the premises. The statute provides that, upon settlement of an executor's account, the Surrogate "shall allow" him, in compensation for his services, a sum to be determined in a certain prescribed mode.

In support of the position that this statutory provision is mandatory, and that no departure from it is ever permissible, two cases are cited : *Halsey v. Van Amringe* (6 *Paige*, 12) and *Dakin v. Demming* (6 *Id.*, 95). Neither of them seems to me to support the claim of these executors. The former case simply decided that the Surrogate erred in not allowing to an administrator his statutory commissions, out of a balance of assets in his hands at the final accounting, but compelling him, as that balance was insufficient for the payment in full of those commissions and of certain costs and allowances to counsel, to accept a pro rata division with the rest. The other case (*Dakin v. Demming*) is quite as indecisive of the matter here at issue. No decision has been cited which holds that, where a will expressly denies an executor compensation, he may nevertheless claim it as of right.

It is, however, suggested that such a right is implied in the Code (§ 2737), which declares that "where the will provides a specific compensation to an executor, he is not entitled to any allowance for his services, unless, by a written instrument filed with the Surrogate, he renounces his specific compensation." Can this be fairly interpreted as a declaration that, in all cases, a renunciation of the particular compensation specified in a will entitles the executor, as of course, to the statutory commissions?

To say that one shall never have one thing, without giving up his claim to another, is not the same as to say that he can always have the first, if the second is surrendered; and to say that one shall never have two things at once is by no means equivalent to saying that

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he can always have his choice between them. If a will declared that its executor should have a certain specified sum for his services, and should have no other or different sum, I see no such inflexibility in the statute as to forbid the strictest adherence to the wishes of the testator.

*Meacham v. Sterne*s (9 *Paige*, 403), involved the question of the compensation of trustees, under a deed containing no provision for their payment. Chancellor WALWORTH held that, in such a case, trustees should be given the same allowance as executors could claim by law; that that sum should be deemed as tacitly understood, where there had been no agreement or direction otherwise; but that, where the instrument creating the trust fixed a different compensation, or declared that none should be allowed, the instrument itself settled the question of allowance. That case is analogous to the one here presented.

These executors entered upon their task, as it seems to me, with an implied,—it might almost be said, with a direct,—understanding, that they would make no charge for their services. It is not apparent that they would have been selected, upon any other terms than the testator specified in his will. They were not bound to accept the trust, but, having done so, they are bound by its conditions.

The object of the statute fixing executors' commissions was to furnish a definite and simple rule, to be applied in all cases where there should be need for the application of any rule at all. It was not intended to restrict testators either from fixing compensation

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to the utter exclusion of statutory allowances, or from forbidding any compensation whatever.

I hold, therefore, that these executors cannot claim, as of absolute right, any commissions, and that if the giving or withholding them is in the discretion of the Surrogate, they ought to be disallowed, in the present case.

To one of these executors, and to the wife of the other, the will grants one-half of the residuary estate. That is probably the reason for the testator's views as to compensation. And the reason seems reasonable

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

THOMPSON v. MOTT.

In the matter of the judicial settlement of the account of HENRY A. MOTT, executor, etc., of ADELAIDE THOMPSON, deceased.

A son of testatrix, who had objected to the account filed by her executor, petitioned for an order directing the latter to deliver certain letters and other papers in his possession, and which testatrix had at the time of her death; not claiming that the articles had any literary value, or were in any sense assets, but alleging that some of them related to the accounting, and were necessary for petitioner's use in that proceeding.

Held, that such an order was unauthorized by statute, no authority to grant it being contained in the provisions of Code Civ. Pro., § 2472, which confers power upon the Surrogate's court to direct and control the conduct of executors, to enforce the distribution of the estates of decedents, and the payment or delivery, by executors, of money or other property in their possession, belonging to the estate,—such jurisdiction to be exercised *in the cases and manner prescribed by statute*.

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UPON the accounting of the executor, etc., of decedent, her son, Frank G. A. Thompson, objected to the account, and asked for an order to compel the executor to produce certain papers in his possession. The facts appear sufficiently in the opinion.

CUSHMAN & VAN PELT, *for executor.*

F. A. RANSOM, *for F. G. A. Thompson.*

THE SURROGATE.—This proceeding is brought in behalf of the son of the testatrix. He asks for an order directing her executor to deliver certain letters and other paper writings, which she had at the time of her death, and which are now in possession of the executor. It is not claimed that these articles have any property value as literary productions, or that they are in any sense assets of decedent's estate. As between the executor and next of kin, the latter are probably entitled to such of them, at least, as are not necessary for the executor's use in making up his accounts. But, after careful consideration, I doubt the authority of this court to compel their delivery to the petitioner. The grant of power in section 2472 of the Code, "to direct and control the conduct of executors, and to enforce the distribution of the estates of decedents, and the payment or delivery by executors of money or other property in their possession belonging to the estate," is not, in my judgment, when viewed in connection with the final provision of the section, broad enough to justify the issuance of such an order as is here prayed for. There seems to be no other statutory provision which is applicable to this subject. No judicial decision has been cited, in support of the claim here urged, and, after much searching, I have found none.

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It is alleged, in the petition, that some of the papers whose delivery it seeks, relate to the accounting, and are necessary for the use of the petitioner, who is the objector in the proceeding now pending before the referee. The executor has intimated that he is ready to produce such papers for the inspection of all persons interested. If he should neglect or refuse to do so, the petitioner can, of course, take such steps as are provided by law for securing their production. Without costs and without prejudice to the institution of any such proceeding, the present application is denied. :

Ordered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

BROWNSON v. ROBERTS.

*In the matter of the judicial settlement of the account of
ROSWELL A. ROBERTS and another, trustees, under
the will of HENRY E. ROBINSON, deceased, for ISA-
BELLA K. BROWNSON and her infant children.*

The testator, by his will, gave to his executors certain powers as trustees of his niece; authorized his "executors and trustees" to act collectively or individually in all matters appertaining to the estate; and, further, provided as follows: "I give and bequeath to each of my executors and trustees the sum of three thousand dollars, in lieu of *any and all commissions*, and in full compensation for their services in closing up my estate and making distribution thereof *in conformity with and on the conditions hereinbefore stated.*" The executors each received \$3,000, and, upon their accounting in their capacity as testamentary trustees, asked for commissions as such trustees, contending that the provision for compensation contained in the will applied to them only as executors.

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Held, that such a construction would be contrary to the letter and spirit of the will, and that the application should be denied.

APPLICATION by testamentary trustees, for commissions, upon the judicial settlement of their account. The facts appear sufficiently in the opinion.

TRACY, OLMSTEAD & TRACY, *for trustees*.

ALFRED H. STEELE, *special guardian for infants*.

THE SURROGATE.—The application of the trustees for commissions must be disallowed. They have each received the sum of \$3,000, the compensation fixed by the will of the testator, and are thereby, as it seems to me, precluded from making any further claim. One clause of the will reads as follows: "I give and bequeath to each of my executors and trustees the sum of three thousand dollars, in lieu of *any and all commissions*, and in full compensation for their services in closing up my estate and making distribution thereof, *in conformity with and on the conditions hereinbefore stated*."

It has been urged that, by this language, the testator meant simply to indicate the compensation to which these applicants should be entitled, in their capacity as executors, and that he did not intend to forbid their receiving, in addition, the ordinary commissions for performing the responsible duties which have devolved upon them since their final accounting as executors. I cannot persuade myself that such an interpretation is correct. It does not seem to me to be in accord with either the letter or the spirit of the will. It is contrary to the letter, because the \$3,000 is given to these applicants as "executors and trustees," and not simply as

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executors. It is contrary to the spirit, because, by comparing this clause with other parts of the will, it will be found that the testator understood the difference between the respective capacities of executor and trustee, and designedly used both those words in his reference to compensation. He gives authority to his executors to act as his trustees, in carrying out the provisions of the will, and authorizes his "executors and trustees" to act collectively or individually, in all matters appertaining to the estate. He also gives certain powers to his executors as trustees of his niece. And, as has been already stated, he gives the \$3,000 legacy in question to his *executors and trustees*, in lieu of any and all commissions, and in full compensation for their services in *closing up the estate and making distribution thereof in conformity with and on the conditions stated in the will*. By the italicized words, I think that the testator must have meant such a closing up and distributing of his estate as would result from the entire discharge and satisfaction of the purposes and trusts of the will.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

GEER v. RANSOM.

*In the matter of the estate of JONATHAN H. RANSOM,
deceased.*

- Under Code Civ. Pro., § 2735, authorizing the Surrogate to require an accounting executor or administrator "to attend and be examined under

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oath," that officer has power, in his discretion, to direct such an examination, upon application therefor, whether formal objections to the account have been filed or not.

APPLICATION for leave to examine executors, upon their account filed. The facts appear sufficiently in the opinion.

BUTLER, STILLMAN & HUBBARD, *for executors*.

HASSLER & BALDWIN, *for legatee*.

THE SURROGATE.—Edward W. Geer, a legatee under the will of the testator, petitions this court for leave to examine the executors, Aaron P. Ransom and Warren A. Ransom, whose account has lately been filed. It is insisted, by way of objection, that the allegations of the petition are not sufficiently definite; that, for aught which therein appears, the petitioner might interpose specific objections to the account, and call the executors as witnesses after an issue thus raised: and that, under such circumstances, an order should not be granted for a preliminary examination of the executors.

While this in strictness may be true, I am disposed to give a liberal construction to the statute upon which this application is founded (*Matter of Hall*, 7 *Abb. N. C.*, 149; *Peck v. Sherwood*, 56 *N. Y.*, 615; *Buchan v. Rintoul*, 70 *Id.*, 1).

Section 2735 of the Code provides that "the Surrogate may, at any time, make an order requiring the accounting party to make and file his account, or to attend and be examined, under oath, touching his receipts and disbursements, or touching any other matter relating to his administration of the estate, or any act

done by him under color of his letters," etc. This provision takes the place of a part of 2 *R. S.*, 92, § 54, which read as follows: "In rendering such account, every executor or administrator may be examined on oath touching any property or effects of the deceased which have come to his hands, and the disposition thereof."

The case of *Westervelt v. Gregg* (1 *Barb. Ch.*, 479), seems to hold, very unequivocally, that the examination of an executor, under this provision of the Revised Statutes, might attend the rendering of his account, and be entirely independent of proceedings toward a judicial settlement.

There seems to be no doubt of the power of the Surrogate to direct, in his discretion, such an examination, whether formal objections to the account have been filed or not. It is urged, by the petitioner, that if his prayer be granted there may be no occasion for any further opposition.

Upon the whole, I have decided to permit the examination of the executors, upon the condition that, in the event of the filing of objections hereafter, the testimony which may be taken in accordance with this decision shall be regarded as testimony taken in the proceedings upon the contested accounting. The examination herein ordered may be had before a referee.

Ordered accordingly.

BUSHNELL v. DRINKER.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
April, 1882.

BUSHNELL v. DRINKER.

In the matter of the estate of GILES BUSHNELL, deceased.

The testator, by his will, bequeathed to trustees \$65,000, to be invested by them on bond and mortgage, directing them to collect the interest and pay the same to testator's son, C., for life; and he bequeathed the principal and interest thereof, on C.'s death, to C.'s children, "to be paid over and equally divided" among them, at the majority of the youngest survivor of them. The will was proved in 1862. C. died in 1880, leaving him surviving his only living child, who petitioned for payment of his legacy, alleging a demand upon, and a refusal to pay by, the trustees. It appeared, on a reference, that the trustees had invested the fund as directed by the will, and that, the same having depreciated without their fault, they tendered the securities, etc., belonging thereto to the petitioner, who refused to receive the same, claiming to be entitled to \$65,000, in full, as a demonstrative legacy.

Held, that the intent of testator, as manifested by the clause providing for an accumulation of interest in case C. should leave a minor child, was that the identical fund, which furnished a life income to C., should, after the latter's death, pass to his children; and that the trustees were not bound to supplement such fund out of the body of the estate, in a sum sufficient to make the value of petitioner's interest \$65,000.

The referee having found that the trustees had made an improvident investment of a portion of the trust funds, for which the petitioner might hold them answerable; and it appearing, from documents on file, that, upon an accounting by them, in 1879, which petitioner was cited to attend, a decree was made settling their account and allowing them full credit for the funds invested in the manner questioned:—*Held*, that such decree was conclusive against petitioner in the proceeding at bar.

THIS was a petition by Giles F. Bushnell, a grandson of decedent, to compel John Drinker, and another, trustees under decedent's will, to pay a legacy. The fifth clause of testator's will was as follows: "I give and

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bequeath to my said trustees, and the survivors and survivor of them, the sum of sixty-five thousand dollars, to be taken from my bonds and mortgages and personal estate, in trust, nevertheless, that my said trustees invest and keep the same invested in good bonds and mortgages, on real estate worth at least one-third more than the amount loaned thereon, and have and keep the buildings thereon, if any, well insured, and take assignments of the policies of insurance, and collect and receive the interest of that sum so invested, and pay the same to my son Charles Ira Bushnell, in semi-annual payments during his natural life, and, at his death, I give and bequeath the principal and interest thereof to the children of my said son Charles Ira Bushnell, to be paid over and equally divided between them, when the youngest surviving child of my said son attains the age of twenty-one years."

The will was admitted to probate in September, 1862. Charles Ira Bushnell, the immediate beneficiary under the clause quoted, died in September, 1880. His son, Giles F. Bushnell, survived him, and was the petitioner in this proceeding. His daughter, the only other child he ever had, died without issue, and before the death of her father.

The petition was filed November 12, 1880. It alleged that Giles F. Bushnell became entitled, at his father's death, to a legacy from his grandfather's estate of \$65,000, and that the trustees under his grandfather's will had refused to pay it.

The trustees answered that a tender had been made, to petitioner's attorney, of all the securities and property to which the petitioner had become entitled; that one

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piece of property so tendered was a house and lot at No. 228 East 128th street, which petitioner, through his attorney, had refused to receive. In the year 1870, the trustees had lent the sum of \$6,000, from the Charles I. Bushnell trust fund, and had taken as security a mortgage upon the premises in question. No interest had been paid upon this mortgage since 1875, and after a time it had been foreclosed; the property had been purchased by the trustees for \$4,300, and a deficiency judgment had been entered against the mortgagor, for the sum of \$3,860.88.

Upon the issues thus joined by petition and answer, a reference was ordered in January, 1881. The referee filed his report February 24, 1882, and the whole matter came before the Surrogate for determination.

G. S. & J. H. STITT, *for petitioner.*

MAN & PARSONS, *for trustees.*

THE SURROGATE.—First. What are the rights of the petitioner under the will? According to the claim of the executors, the testator intended that the identical fund which furnished a life income to his son Charles, should, after the death of the son, pass to the children who survived him. If this view be correct, it is of course immaterial whether, in the lapse of years, the value of such fund has grown, or has dwindled, or has remained unaltered. The transfer, to this petitioner, of the very trust estate which afforded an income to his father, whether the same is worth \$65,000, or more or less, will fully satisfy the testator's bequest.

Now, what is the alternative, if this be not accepted as the true reading of the will, but if, as is claimed by

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petitioner, the trustees are bound to supplement the trust fund out of the body of the estate, in a sum sufficient to make up the value of his interest to \$65,000? It seems to me that to allow such a claim would involve a very forced interpretation of this will. It would be to construe it precisely as if it had given to Charles I. Bushnell, during his life-time, the income of \$65,000, and had given to his children a separate and distinct legacy of a similar amount, payable upon the death of their father, and the attainment of his majority by the younger child.

In other words, the petitioner, to be consistent in his claim, must insist that whatever he takes under the will really comes out of the body of his grandfather's estate, and is in no manner dependent upon, or affected by, or associated with the life estate of his father. If this be so, it is hard to understand why the testator provided that if Charles should die, leaving a minor child, the trustees should continue, until that child had become of age, to keep invested as a distinct trust, the fund which had afforded his father a life income.

It seems to me very evident that the decedent had just such intentions with respect to his child and grandchildren, as find expression every day in testamentary papers. He designed that his grandchildren should enjoy full and absolute possession of that very property of which their father, in his life-time, had enjoyed the use.

The cases of *Giddings v. Seward* (16 *N. Y.*, 365), and *Pierrepont v. Edwards* (25 *N. Y.*, 128), are cited by petitioner's counsel, as authority for the claim that this will gives to Giles F. Bushnell a demonstrative legacy, the full amount of which must, at all events, be paid to

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the legatee, whatever lot may have befallen the fund which yielded a life interest to his father. I cannot find that any such purpose is disclosed by the language of the fifth clause of this will, whether considered by itself or in connection with the other parts of the instrument. I hold, on the contrary, that if, as directed by the testator, the trustees set up a fund of \$65,000 during the life of his son Charles, and have kept the same invested as the will directs, they will now discharge their full duty to this petitioner by delivering that identical fund into his hands.

Second. Certain evidence was given before the referee, which is claimed to justify his finding that, among the various investments of the trustees, the 128th street loan was an improvident one, for which the petitioner may hold them answerable. The trustees insist, on the other hand, that none of their investments can here be the subject of contest, because the accounts which include them have been long since settled by the decrees of this court. To this it is objected that these decrees are not binding upon this petitioner, because he was not a party to the proceedings of which they were the culmination.

In reply, it is urged that, as his father was then alive, there was no need of citing the petitioner, who had at that time only a prospective and contingent interest in the estate, to attend these accountings. The records of this court furnish a better answer to this objection, disclosing, as they do, certain facts which counsel on both sides seem to have forgotten.

In March, 1867, upon the petition of Ann Bushnell, executrix of Giles Bushnell's estate, a citation was

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issued to divers persons interested, to attend her final accounting. Among others, duly cited, was this petitioner, as is shown by affidavit on file. It appears, by this accounting, and the decree entered thereon in January, 1869, that certain bonds, mortgages and other securities, in the sum of \$65,000, had been allotted and set apart to the testamentary trustees for the benefit of Charles I. Bushnell.

It also appears, by affidavit on file, that this petitioner, among others, was duly cited to attend a subsequent accounting of the trustees, and that by decree of April 15, 1879, their account was settled, and they were allowed credit touching the 128th street investment, in the sum of \$8,160.88, whereof \$4,300 was for the amount paid by them on the foreclosure sale, and \$3,860.88 was for the deficiency judgment. No application has been made for setting aside or modifying these decrees, either as respects these matters or any others.

They must, therefore, as it seems to me, be deemed conclusive against this petitioner and decisive of the present controversy.

Decreed accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
May, 1882.

DALE v. STOKES.

*In the matter of the probate of a paper propounded
as the will of JAMES STOKES, deceased.*

The petitioner, who was contesting the probate of a paper propounded as the will of decedent, her father, applied for an order directing the tem-

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porary administrator, her brother, who was also proponent, to produce and deposit in court, subject to examination by herself and her counsel, certain books and papers of the decedent, alleging, on information and belief, that the latter kept books of account and preserved letters, documents, and papers relating to the estate, of interest to him and his children; that he was, latterly, somewhat under the influence of his sons, including the respondent, one or more of whom kept said books; that the books and papers referred to were in the possession of respondent, who was unfriendly to her and permitted her opponents to examine the same for evidence in support of the will, while she was unable to obtain any such information; that she desired to ascertain, from an inspection, how far the books, etc., contained evidence material to the pending controversy, and also to satisfy herself as to the condition of the estate; that she could not specify, with more particularity, the documents referred to, because she had never seen any of them. It appeared that the only attempt which petitioner had made to obtain the desired inspection, was a letter from her counsel to the counsel of the administrator, asking when and where she could examine "the books and papers of the late James Stokes, his books of account and other papers;" to which it was replied that the extent to which documents of the estate should be furnished for examination was in the discretion of the Surrogate. The application was urged, not on the strength of any express statutory provision or decided case, but on the ground that both parties should enjoy the same privileges, and that the control of the court over the temporary administrator was broad enough to justify the order asked. *Held*,

1. That the powers of the Surrogate in the premises were exclusively such as were derived from statute.
2. That his *general* control of executors and administrators, so far as concerned the matter in discussion, depended upon Code Civ. Pro., §§ 2472, 2481, neither of which sections justified the granting of the relief asked.
3. That, so far as the proceeding was, substantially, one for discovery and inspection, it must be governed by Code Civ. Pro., §§ 803-809, and § 2588; under which sections, and the decisions, the petition was faulty for want of particularity, and in not stating facts showing the necessity of the inspection, etc.
4. That the letter of the administrator's counsel was not to be deemed a refusal to permit a proper inspection, in view of the sweeping character of the petitioner's demand.
5. That to grant orders of the character asked, under the circumstances presented, would be to interfere with the orderly administration of estates, and foster unnecessary and profitless litigation; and that the application should be denied.

THIS was an application by Dora S. Dale, who was

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contesting the probate of the will of decedent, to compel the temporary administrator to produce certain documents. The facts appear sufficiently in the opinion.

THERON G. STRONG, *for Mrs. Dale.*

BUTLER, STILLMAN & HUBBARD, *for administrator.*

THE SURROGATE.—Mrs. Dora S. Dale, who is contesting the probate of a paper propounded as the will of her father, James Stokes, asks that the temporary administrator of his estate be directed to produce certain documents before the Surrogate. The petitioner alleges that the decedent, in his life-time, kept books of account of his personal transactions affecting the estate, and that he preserved divers letters, documents and papers of interest relating thereto, and otherwise of interest to him and to his children; that, during the latter years of his life, decedent was, to a considerable extent, under the influence of his four sons, one of whom is the temporary administrator, and that said books of account, or a portion of them, were kept in whole or in part by one or more of said sons; that the said books and papers are in the possession and under the control of Anson P. Stokes, who is temporary administrator of the estate, and that the proponents of the will are permitted to examine such books and papers, and procure such evidence as they may find therein in support of the will; that her brothers are unfriendly to her, and that she is unable to obtain through them any information whatever. All the foregoing allegations are made upon information and belief. The petitioner adds that she has been advised and believes that she is entitled to examine and inform herself of the contents of said books and papers—first,

to ascertain how far they may contain evidence material to the probate controversy ; and second, to satisfy herself as to the condition of the estate. She declares that she cannot specify with greater particularity the names of the books, or the description of the papers or letters she desires to inspect, because she has never seen any of them. She thereupon asks that an order be granted, directing that said books and papers be deposited in this court, subject to her examination and that of her counsel. The argument which has been made in her behalf is not claimed to be supported by the authority of any reported case. Indeed, the only precedent which is cited as furnishing a guide for the decision of the court upon this application, is the action of Surrogate Bradford, pending the contest over the probate of the Parish will.

At page 181, volume 1, of the report of that trial, appears the following statement: "The counsel for the contestants having heretofore required the Surrogate to order the production of all books of Henry Parish, and accounts and powers of attorney purporting to be executed by him subsequently to the attack spoken of in the proofs, and the Surrogate thereupon having ordered the party propounding the will and codicil to produce said books, so far as the same are within his power and control, to be deposited with the Surrogate, subject to the inspection of the counsel for the contestants, and subject to the further order of the Surrogate in relation thereto ; the said proponent now produces the following books." Then follows a short list specifying two books of account, a memorandum book, several check books and pass books, and two powers of attorney.

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This is all the allusion to the matter, which I have found in the report of the trial. It does not appear whether the direction to bring these documents into court was with the consent of proponent's counsel, or despite his opposition, or whether the contestants had or had not previously made a definite and precise statement as to the number, kind and character of the books and papers whose production was sought, and as to the reasons why such production might properly be ordered by the Surrogate. It can scarcely be claimed, therefore, that the course of my distinguished predecessor at that trial established a legal precedent, which would sanction my favorable consideration of the present contested application.

My attention has been called to no other case, in which a Surrogate has been reported as exercising such power as is here invoked, and no cases have been cited, in support of any doctrine at all analogous to that upon which the present claim is sought to be maintained. Indeed, the contestant's counsel frankly avow that they found their application solely upon the ground of its reasonableness and equity, and not upon the authority of decided cases, or the specific requirements of the statute. They insist that their client ought to be accorded the same privileges which are enjoyed by the proponents, and they urge that the control of the Surrogate over the temporary administrator is broad enough to justify his issuance of the order prayed for.

I have been much impressed with the urgency of this appeal, and have diligently striven to ascertain what of right ought to be done in the premises. It has been so frequently and so emphatically decided that this court

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has no jurisdiction save what is conferred upon it by statute, that a citation of the authorities which maintain that proposition is quite unnecessary.

Now the power of the Surrogate over executors and administrators (so far as concerns the matter under discussion), is granted by sections 2472 and 2481 of the Code. By subdivision 3 of the former section, he is empowered to direct and control the conduct of those officers, but he is cautioned by the closing words of the section that "this jurisdiction must be exercised in the cases, and in the manner, prescribed by statute."

By subdivision 5 of section 2481, the Surrogate is also authorized "to require by order an executor or administrator to perform any duty imposed upon him by statute, or by the Surrogate's court under authority of a statute."

Does either of these sections contain any such grant of power as would justify the entry of an order in conformity with this petition? It is manifest that, in considering the nature and extent of the control of the court over the temporary administrator of this estate, it is an immaterial circumstance that such temporary administrator is a proponent of the will, and one of the next of kin and heirs at law of the decedent. I mean by this that it is solely in his capacity as temporary administrator, and not at all in his capacity as party, that the Surrogate can be deemed to have any such authority as he is here asked to exercise. In other words, the Surrogate has precisely the same right of control over Anson P. Stokes that he would have had over any other person, not a party to this contest, who might have been appointed temporary administrator. Of course, the cir-

cumstance that the interests of the present administrator are to some extent adverse to those of the petitioner, may of itself furnish a reason for the exercise of whatever power the statute confers, but that circumstance does not enlarge the lawful scope of such power in the slightest degree.

The claim of contestant's counsel seems to me to ignore the truth of this proposition. For, while this application is in form a prayer that the court will control the action of one of its officers, in substance it asks the aid of this court, as against an adverse party to the controversy over the probate; and this aid, as it seems to me, the court is powerless to give upon the present application. The petition declares that "during his lifetime the decedent kept books of account of his personal transactions affecting his estate, and preserved letters, documents and papers of interest relating thereto, and otherwise of interest to him and to his children;" and it asks that "an order be granted directing that said books and papers be deposited in court, subject to the examination of petitioner and her counsel," for the avowed purpose of discovering "how far they may contain evidence material to this controversy," and in order that she may thereby "satisfy herself as to the condition of the estate." In so far as this petition substantially seeks for discovery and inspection of such books and papers as the proponent would have been entitled to hold against the claim of any other person who might have been appointed temporary administrator, if he himself had not been named, it is plainly *coram non judice*.

By section 2538 of the Code, its provisions touching inspection and discovery (§§ 803 to 809, inclusive) are

made applicable to this court. These provisions take the place of section 6, title 1, ch. 2, part 3, of the Revised Statutes, whereby the Surrogate was authorized "to issue subpoenas to compel the production of any paper material to any inquiry pending in his court."

By section 803, "a court of record . . . has power to compel a party to an action pending therein to produce and discover, or to give to the other party an inspection and copy, or permission to take a copy, of a book, document, or other paper in his possession, or under his control, relating to the merits of the action or of the defense therein."

Section 804 provides that the general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act. These sections, in cases where they are applicable, furnish the only means provided by existing laws for obtaining the relief to which they relate. They are in substantial accord with the statutory provisions for which they are a substitute, and the scope and effect of those statutory provisions have been repeatedly the subject of adjudication by our courts.

It has been held that a petition for such discovery and inspection must state facts showing the necessity thereof; that such petition is faulty and ineffectual if it only alleges that the party "expects" to prove, or "thinks" he can prove, the facts in question; that the documents whose production is demanded must be specially set forth, and with sufficient particularity to enable the opposite party to know with certainty what is wanted; and that it is not enough to assert that they contain

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evidence relative to the merits of the action, but that it must appear wherein such relation consists (see *Mott v. Consumers' Ice Co.*, 52 *How. Pr.*, 148; *aff'd, Id.*, 244; *Davis v. Dunham*, 13 *Id.*, 425; *Hoyt v. American Exchange Bank*, 1 *Duer*, 652; *Jackling v. Edmonds*, 3 *E. D. Smith*, 539; *Cassard v. Hinman*, 6 *Duer*, 695; *Brooklyn Life Ins. Co. v. Pierce*, 7 *Hun*, 236; *Morrison v. Sturges*, 26 *How. Pr.*, 177; *Harbison v. Von Volkenburgh*, 5 *Hun*, 454; *Walker v. Granite Bank*, 44 *Barb.*, 39; *Gelston v. Marshall*, 6 *How. Pr.*, 398; *Opdyke v. Marble*, 44 *Barb.*, 64; *Brevoort v. Warner*, 8 *How. Pr.*, 321; *Phelps v. Platt*, 54 *Barb.*, 557; *Wilkie v. Moore*, 17 *How. Pr.*, 480; *Pegram v. Carson*, 10 *Abb. Pr.*, 340; *Low v. Graydon*, 14 *Id.*, 443; *Brownell v. Bank of Gloversville*, 20 *Hun*, 517).

In the last named case, the court makes use of this language: "This is evidently a fishing examination, to enable the plaintiffs to discover something, if there be anything worthy of discovery. It has been frequently held that such an examination should not be granted."

Now, of just such a character as is here criticised is the examination which is solicited in the present case. This, indeed, was admitted by counsel for the petitioner, upon the argument of this motion. It was urged, however, that she did not found her claim upon the statutory provisions relating to discovery, but upon the broader ground that this court, in the furtherance of impartial justice, should see to it that proponents and contestants are in all respects put upon an equal footing.

As has been already intimated, however, my views as to what equity demands can be made effective only so far as they accord with what the statutes permit, and the

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sections above quoted from the Code seem to forbid my granting the present application. In declaring this decision, I do not mean to intimate what action might be taken upon a petition more limited in its scope and more definite in its terms. But, as the denial of this motion for the cause assigned may be followed by similar applications in this case, or in other cases, it seems proper to state that, even if the power were unquestioned, I should not feel justified in granting any such order as is here asked, under the circumstances disclosed by the motion papers.

A broad, sweeping direction that the books, papers, letters and documents which were in the possession of a decedent at his death, and are of interest to him and his children, should be taken from the custody of the executor or administrator, and deposited in this court, is a direction which in my judgment should not be made, even though the law warranted it, save under very extraordinary circumstances.

No such extraordinary circumstances have been discovered to exist in the case at bar. Since the temporary administrator entered upon his duties, it can scarcely be said to appear that the contestant or her counsel have been refused leave to examine the books of account of decedent, or any other books or papers relating to his estate or its administration. So far as was disclosed upon the argument of this motion, the sole attempt of the contestant to obtain an inspection of any such documents since the administrator was appointed, and the sole act on his part which can be regarded as a discouragement of that attempt, are evidenced by two letters which have passed between himself and the petitioner's counsel.

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The latter asked to be informed when and where Mr. Stokes would afford his client "an opportunity of examining the books and papers of the late James Stokes, his books of account and other papers." In reply, the administrator stated that he had been advised that his custody as administrator was that of the court which appointed him, and that the extent to which he should furnish for examination documents pertaining to the estate was within the discretion of the Surrogate. I do not think that this letter, in view of the broad request to which it is an answer, can be fairly construed as a refusal of petitioner's application.

Even if this court, therefore, were unrestrained by the statute, it would not feel justified, upon the evidence now presented, in directing the production and deposit of any of the books, papers, letters and documents which were connected with the business and private life of the decedent.

No special features are shown to exist in the present case, which take it out of the category of other contested cases; and it would establish a troublesome, and, all in all, an unjust precedent, to hold that a sweeping order of this nature could be made at the instance of any next of kin, heir at law, or other person interested, who might see fit to apply for it under circumstances like the present. Such a course would seriously interfere with the orderly administration of estates, and would foster unnecessary and profitless litigation.

Motion denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
May, 1882.

MARTIN v. DUKE.

In the matter of the estate of RALPH MARTIN, deceased.

Thrift, integrity, good repute, business capacity and stability of character are "circumstances," which may be very properly considered in determining the question of "adequate security," upon an objection, under Code Civ. Pro., § 2638, to the issue of letters to one named as executor in a will, on the ground "that his circumstances are such that they do not afford adequate security to the creditors, or persons interested in the estate, for the due administration of the estate." The word "circumstances" does not refer exclusively to pecuniary responsibility.

The statute was by no means intended to restrict a person named as executor from acting as such, without a bond, simply because the testator was richer than himself.

In such case the question for the court is,—is it safe to put this estate in the hands of the person named as executor; can he be trusted to administer it faithfully and honestly, as directed by the will?

The testator, by his will, nominated his wife, M., and his sister, D., as executrices. Objections to granting letters testamentary to them, were interposed, on the grounds that they were unacquainted with and incompetent to discharge the duties; that M. was about to absent herself from the State "for an uncertain period of time;" and that neither "the condition and circumstances" of M., nor those of D., afforded "adequate security to the persons interested," etc.; and objector asked that letters be refused, unless they first gave adequate security for the administration of their trust. M. answered that she intended to continue her residence in the State, though she designed to make a summer visit in Europe, and that she had acquired a thorough knowledge of his property and its management from the testator. D. answered that she had had some experience in administering an estate, and owned real property worth \$200,000 in Brooklyn.

Held, that, as D., at least, was pecuniarily responsible, and both she and M. had sufficient capacity and integrity to make their appointment prudent and proper, aside from property considerations, the objections should be overruled and letters granted.

Freeman v. Kellogg, 4 *Redf.*, 325,—criticised.

THIS was a hearing of objections to the issue of let-

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ters testamentary, made by Henrietta Martin, a daughter of testator. The facts appear sufficiently in the opinion.

JOHN M. MARTIN, *for objector.*

ANDERSON & HOWLAND, *for executrices.*

THE SURROGATE.—By the will of the testator, his wife and sister were nominated as executrices. Objections have been interposed to granting to these ladies letters testamentary, upon the ground that they are unacquainted with the duties which they seek to assume and incompetent to discharge them; that Mrs. Martin, the testator's widow, is about to absent herself from the State of New York "for an uncertain period of time," and that neither "the condition and circumstances" of herself nor those of Mrs. Duke, her sister-in-law, "afford adequate security to the persons interested in the due and proper administration of the said estate and the affairs thereof." The objector accordingly asks that letters testamentary be refused to Mrs. Martin and Mrs. Duke, unless they "first give adequate security" for the administration of their trust.

In answer to these allegations, Mrs. Martin declares, upon oath, that it is her purpose to continue her residence in New York, although she means to make a summer visit in Europe; that during her husband's life-time she acquired a thorough knowledge of the nature of his property, receiving from him explicit information in respect thereto, and explicit directions as to its management. Mrs. Duke swears that she herself has already had some experience in administering an estate, and that she is the absolute owner of real property, in this city and Brooklyn, worth \$200,000.

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The foregoing objections to the granting of letters testamentary are claimed to be sufficient, within the provisions of section 2637 of the Code. By this section and the one next succeeding, it is substantially provided that, if legal objection is seasonably made to the issue of letters testamentary, the same shall not be granted, unless upon the filing of a sufficient bond, to any person named as executor, whose "circumstances are such that they do not afford adequate security for the due administration of the estate." The allegations made by the objector herein are inadequate to justify my refusal of letters.

Even if it appeared, as it does not, that the value of the property owned by these applicants for letters was very much less than the value of the testator's estate, I should not, for that reason, feel bound to make the confirmation of their appointment conditioned upon their filing bonds as security for the faithful discharge of their duties.

In *Freeman v. Kellogg* (4 *Redf.*, 225), a construction was put upon certain language in the Revised Statutes, which is substantially equivalent to the phrase now under review. The word "circumstances," in the phrase "or that his circumstances are so precarious as not to afford adequate security," was construed as referring solely to pecuniary responsibility, and not at all to personal character or conduct. The decision of the supreme court, in *Shields v. Shields* (60 *Barb.*, 56), was criticised as an obvious misinterpretation of the statutory provision, and as a departure from the doctrine laid down by Chancellor WALWORTH, in *Wood v. Wood* (4 *Paige*, 299).

I do not put the limited construction upon the word "circumstances" which is suggested in *Freeman v. Kellogg*, nor do I think that any such construction is involved in the decision of *Wood v. Wood* (*supra*). If the legislature had designed to establish the test of personal pecuniary responsibility as an essential qualification of any person claiming testamentary letters without giving a bond, it would have expressed its intention in much plainer terms. It has never found any difficulty in declaring the precise sort of security to be exacted from an administrator, and the difference in the phraseology of the respective statutes which affect executors and administrators is, in this regard, very significant. At common law, the person named as executor was entitled to letters, even though he might be notoriously insolvent.

The statute, for which the present provision of the Code has been substituted, was manifestly designed to give the Surrogate power to refuse letters or to retract them whenever, under all the circumstances of the case, he should be of the opinion that such a course was proper for the protection of the rights and interests of the beneficiaries under the will. But that statute was by no means designed to restrict a person named as executor from acting as such, even without a bond, simply because the testator was a richer man than himself. Thrift, integrity, good repute, business capacity and stability of character, for example, are "circumstances" which may be very properly considered in determining the question of "adequate security."

The only New York case not yet mentioned, which bears directly on this subject, is *Mandeville v. Mandeville* (8 *Paige*, 475). In that case, the opinion of Chancel-

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lor WALWORTH plainly discloses that, by his decision in *Wood v. Wood*, he by no means intended to intimate that such considerations as have been above suggested might not have weight, upon the question as to what constituted "adequate security." Every case must be considered by itself. In each, the question for the Surrogate is: Is it safe to put this estate in the hands of the person named as executor; can he be trusted to administer it faithfully and honestly, as directed by the will?

Now, for aught that appears in the present case, one at least of the ladies named as executrices is pecuniarily responsible, and both of them have sufficient capacity and integrity to make their appointment prudent and proper, aside from property considerations. Letters may issue.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—
June, 1882.

MATTER OF ROOSEVELT.*

In the matter of the judicial settlement of the third annual account of JAMES A. ROOSEVELT, surviving trustee, etc., of JAMES I. ROOSEVELT, deceased.

The act of 1866 (ch. 115), amendatory of 2 R. S., 94, § 66, and which expressly authorized the Surrogate's court to grant commissions to testamentary trustees, was extinguished by L. 1880, ch. 245; but this extinguishment did not deprive the Surrogate's court of power to allow such commissions,—testamentary trustees being within the equity of

* See *Meeker v. Crawford*, *ante*, p. 450; *Scovel v. Roosevelt*, *ante*, p. 121; *Roosevelt v. Roosevelt*, *ante*, p. 264.

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the statute, 2 R. S., 93, § 58, relating to the compensation of executors and administrators, and the right to grant commissions being an incident to the jurisdiction over the accounting.

It was the evident purpose of chapter 18 of the Code of Civil Procedure to give to the Surrogate precisely the same authority in reference to testamentary trustees, as that with which he is invested as regards executors and administrators. Authority to allow commissions to such trustees is implied in title 6 of that chapter.

The fact of one's reception of commissions as executor is not, *ipso facto*, a bar to his claim for commissions, as trustee, upon the same fund.

Where a separation of the two functions of executor and trustee is clearly intended by a testator, and has been actually effected, double commissions may be allowed to one person acting in both capacities.

The question whether trust duties enjoined by a will are a mere enlargement of executorial functions, or involve the existence of a trustee as such, may be tested by a consideration of the effect of the resignation or removal of the executor.

The uniform construction of statutes of this state, awarding commissions for "receiving and paying out" moneys, is that one-half is deemed to be given for the reception, and one-half for the disbursement thereof.

The testator, who died in April, 1875, by his will nominated A., B. and C., as "executors thereof and trustees under the same;" of whom A. and B. qualified, C. omitted to qualify, and B. died in February, 1878. By the fifth clause, testator gave to his executors the residue of his personality, in trust to divide equally, and set apart for investment, in the names of the executors and trustees, shares for his surviving children, respectively; to receive the income of each share, and apply the same to the use of the several children, for life, and, upon the death of each, to transfer the share to his or her issue; and, in case any child should die before testator, leaving issue, to hold such child's share, as trustees, in trust to receive the income, and apply it to the use of such issue during minority. By the sixth clause, testator gave the residue of his realty to his executors, "as trustees in trust," to receive the rents, etc., and apply them substantially in the same manner as before provided concerning the income of the personality. Three adult children survived testator. In December, 1878, the executors accounted, *as such*, for the personality which had come into their hands, and also *as trustees* for the *rents* of the realty. Upon the settlement of that account, they were awarded full commissions, both upon the *capital* of the personality then ready to be set apart for the three trusts, and upon the entire *income* of the personality. *As trustees*, they were allowed, also, commissions upon the income of the trusts of realty. The decree directed the accounting parties to divide the estate in their hands, amounting to over \$1,200,000, with the exception of one item, into three parts, and invest the same "in the names of the said executors as trustees," for the children, respectively. The executors divested themselves, *as such*,

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of the securities, making formal assignments thereof to themselves, as trustees, for the three trusts, and kept the accounts relating to the same separate from each other, and from those relating to the balance of the estate. After B.'s death, A. accounted in March, 1878, and in March, 1881, *as trustee*; and in November, 1881, he accounted *as executor*, for assets retained in that capacity. Upon the settlement of the third annual account, application was made for an allowance to A., and to the representatives of B., of commissions *upon the corpus* of the real estate, and, *as trustees*, upon the capital of the personal trusts.

Held,

1. That the court had jurisdiction to allow the commissions of the testamentary trustees, notwithstanding the repeal, in 1880, of Laws 1866, ch. 115.
2. That A. and B. were "testamentary trustees," within the definition of Code Civ. Pro., § 2514, the trusts executed by them being separable from their functions as executors.
3. That a proper case was presented for an allowance of trustees' commissions, a separation of the functions of executor and trustee having manifestly been intended by the testator, as well as effected pursuant to a decree of the court.
4. That each of the trustees was entitled, as such, to one-half commissions (*viz.* : for receiving), upon the entire capital of the personal, and also of the real trusts.

APPLICATION for allowance of commissions to testamentary trustees, upon a judicial settlement of their account. The facts appear sufficiently in the opinion.

DE WITT, LOCKMAN & KIP, *for trustees*

BARTLETT, WILSON & HAYDEN, *for Frederick Roosevelt.*

KURZMAN & YEAMAN, *for Charles Y. Roosevelt.*

PEABODY, BAKER & PEABODY, *for Marcia O. R. School.*

CHARLES F. CONNOR, *special guardian.*

THE SUREGATE.—This is an application for the allowance of commissions to James A. Roosevelt (whose account as surviving trustee of decedent's estate has recently been filed in this court), and also to the repre-

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sentatives of his deceased co-trustee, Theodore Roosevelt.

By the will of the testator, these two gentlemen and John Q. Jones, or such of the three as might qualify, were named as "executors thereof and trustees under the same." The fifth clause of the instrument gives to his executors all the testator's personal estate not otherwise effectually disposed of, in trust, to divide the same into as many equal shares as he may have children living at his decease, to set apart such shares for investment in the names of his executors and trustees, for each of such children respectively, to receive the interest and income of such shares, and to apply the same to the use of such children respectively, during their natural life, and, upon the death of each of them, to assign and transfer his or her share to his or her issue then living, according to their stocks. The fifth clause of the testator's will further provides that if, during his own life-time, any child shall die leaving issue, such issue shall take the share of their parent, but that, during their respective minorities, the same shall be held for their benefit by the executors, as trustees, in trust to receive the income thereof, and apply the same to the use of such issue, respectively, during their respective minorities. By the sixth clause of the will, all the real estate of the testator, not otherwise effectually disposed of, is given to his executors, "as trustees, in trust" to receive the rents, issues, and profits thereof, and apply the same as is therein specifically directed. These directions are substantially the same as are provided in the previous clause, for the disposition of the personalty.

The testator died in April, 1875. Three children sur-

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vived him, all of whom had attained their majority at his death. Soon after the probate of his will, James A. Roosevelt and Theodore Roosevelt qualified as executors and trustees. Mr. Jones never qualified.

In December, 1876, the executors accounted as such, for the personal estate which had come into their hands, and also as trustees for the rents, issues and profits of the realty. Upon the settlement of that account, they were awarded, as executors, full commissions, both upon the capital of the personalty, which was then ready to be set apart to the trusts for the three children, and upon the entire income of the personal estate. As trustees, they were also allowed commissions upon the income of the trusts of realty. They have as yet received no commissions whatever upon the corpus of the real estate, and none, in their capacity as trustees, upon the capital of the personal trusts. To these commissions they now assert the claim which is the subject of the present contention.

The three trusts in question were duly set up as directed by the decree, except that certain assets valued at about \$100,000 could not be immediately assigned, and the executors, as they were directed to do, retained the same for future disposition.

The decree provided that, with this exception, the estate then in the hands of the executors, valued at about \$1,200,000, should be divided into three parts for the three children of the testator, and should be invested "in the names of the said executors as trustees," for each of such children respectively. The executors thereupon proceeded to divest themselves as executors of all the securities, apportioning the same to the respective trusts

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equally, and making separate formal assignments thereof to themselves, in their capacity as trustees of each of the three trusts.

Since the entry of that decree, the investments of each of such trust funds have been made in the name of the trustees thereof, as such trustees, and all the accounts relating to those trusts, respectively, have been kept separate and distinct from each other, and from the accounts relating to the rest of the testator's estate. One of the executors and trustees, Mr. Theodore Roosevelt, died in February, 1878. Since that date, there have been two annual accountings by his survivor. One of these was made in March, 1878, and the other in March, 1881. In November, 1881, James A. Roosevelt made a second accounting, as surviving executor, for such portion of the estate, and for such portion only, as he had continued to hold in that capacity.

It has been strenuously insisted, by the counsel for the *cestuis que trust*, that the trustees have already received compensation fully commensurate with their labor and responsibility. It has, on the other hand, been as earnestly contended by opposing counsel, that the amount hitherto allowed these gentlemen has been but a meagre reward for the performance of duties at once delicate and onerous.

Which of these conflicting views is the more reasonable and just is foreign, however, to this discussion, for reasons which will presently be made apparent.

There are several questions at issue in this proceeding: 1st. Has this court jurisdiction under the existing law to allow commissions, at all, to testamentary trustees? 2d. If it has such jurisdiction, should it ever allow to

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persons who have received commissions as executors, additional compensation as trustees under the same will ? 3d. If such allowance is found to be under any circumstances legal and proper, is it demanded by the particular circumstances of the case at bar ? 4th. If commissions are to be here awarded, what should be the basis of computation ? These questions will be considered in their order.

First. Is the Surrogate now authorized to direct the payment of commissions to testamentary trustees, at the time of their accounting as such ?

Prior to the year 1850, it is indisputable that this court had nothing whatever to do in respect to any of the incidents of a trustee's accounting. It was by chapter 272 of the laws of that year—entitled “An act to provide for the settlement of the accounts of testamentary trustees”—that these matters were first brought within the jurisdiction of the Surrogate.

The statute just referred to was in form an amendment of section 66, title 3, chapter 6, part 2, of the Revised Statutes. That section declared that “the last preceding section” (which related to the accountings of executors) “should not extend to any case where an executor was liable to account to a court of equity, by reason of any trust expressly created by any last will or testament.”

The amendatory act of 1850, *supra*, provided that any testamentary trustee, or executor, or administrator with the will annexed, might “from time to time render and finally settle his accounts before the Surrogate, in the manner provided by law for the final settlement of the accounts of executors and administrators.” It further

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declared that a final decree upon such accounting should have "the same force and effect as the decree or judgment of any other court of competent jurisdiction on the final settlement of such accounts, and of the matters relating to such trust, which were embraced in such accounts, or litigated or determined on such settlement thereof."

This statute of 1850 did not specify the amount of commissions grantable to testamentary trustees, nor make any express provision for the allowance by the Surrogate of any commissions whatever. Whether a grant of power to award such commissions was a necessary incident of the authority accorded by that statute is a matter which will be hereafter considered.

There was no further legislation upon this subject until 1866, when an additional amendment was made to section 66 of the Revised Statutes, *supra* (see ch. 115, Laws 1866). This amendment expressly provided that, upon the accounting of testamentary trustees, the Surrogate should "allow . . . the same compensation . . . by way of commissions, as was allowed by law to executors and administrators." That allowance had, long before, been fixed by section 58, title 3, chapter 6, part 2 of the Revised Statutes, and, save in particulars not necessary to be here considered, has remained unchanged to this day.

Now it is claimed that each and all of the foregoing provisions, for the accounting and compensation of testamentary trustees, have been absolutely blotted out of existence by the general repealing act of May 10, 1880, and that, although the present Code of Civil Procedure has in the main rebuilt the structure thus destroyed, it

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has failed to re-establish the authority of the Surrogate to award to such trustees any compensation whatever. The statute of 1866 (ch. 115) was not in terms repealed by that of May 10, 1880, nor was the act of 1850 (ch. 272). But section 66 of the Revised Statutes, to which they both attach as amendments, was itself absolutely extinguished.

This naturally suggests the inquiry whether the repeal of an act, by reference to its original title or description, operates also as a repeal of other acts by which it has been amended. The general doctrine of statutory construction applicable to this subject need not, however, be considered in the present case, as the repealing act in question establishes its own standard of interpretation. Section 2 of that act (ch. 245, Laws 1880) declares that the repeal of the portions of the Revised Statutes specified in the next preceding section (and in that section there is a distinct specification of section 66) effects also the repeal "of all of the existing laws which expressly amend the portions of the Revised Statutes so repealed, by adding to or otherwise altering the text thereof."

It is provided also by section 3 of the repealing act in question, that, except as otherwise provided in section 2 just quoted, "the repeal of any provisions of the existing laws which have been amended by a subsequent provision of those laws not expressly repealed by this act, does not affect the subsequent provision." Now, both the act of 1850 and that of 1866 are "subsequent provisions" amending a law which is abrogated by the general repealing statute. Are those two amendatory acts within the protection of section 3, or are they, on the other hand, under the ban of section 2? Very manifestly, the

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latter is the case, unless they are saved by force of the phrase, "by adding to or otherwise altering the text thereof."

Either those words are idle, meaningless and worse than unnecessary, or else they contain a plain implication that certain provisions of the Revised Statutes have been amended in some other fashion than "by adding to or otherwise altering the text thereof." And such provisions, if any there be, are kept alive by section 3.

Now, in a broad and general sense, whenever a statute has been so dealt with that it has ceased to be precisely the same as it was originally, such statute may fairly be said to have been altered. But, in a more restricted and exact sense, it may, perhaps, be true that the utter extinguishment of all its original words by the substitution of others not simply modifying its meaning, but utterly reversing it, is somewhat infelicitously and even inaccurately described by styling it an "alteration." In technical language it is of course an "amendment," but it may be doubted whether it is such an amendment as is made "by adding to or otherwise altering the text."

If these words restrict the scope of the general repealing statute in the way that has been suggested, the acts of 1850 and 1866 are of course unaffected by the destruction of section 66; for the slightest reflection will make it apparent that, only in the most general and comprehensive sense, can the two amendatory statutes be said to add to or otherwise alter the original text.

While this suggestion seems to me well entitled to consideration, in view of that rule of construction which requires that, if possible, some effect must be given to

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every word in a statute, I am inclined to think that this oft-quoted phrase, "by adding to or otherwise altering the text thereof," must be treated as surplusage, and that, accordingly, both the act of 1850 and that of 1866 have ceased to exist. This view rests upon the theory that the words in question were inserted by the draftsman out of abundant caution, though precisely what he was abundantly cautious about is not apparent. If these acts amendatory of the Revised Statutes are no longer in force, it is by the provisions of the Code of Civil Procedure that the Surrogate's authority must now be tested.

Chapter 18 of that Code is devoted exclusively to the subject of "Surrogates' courts and proceedings therein." It consists of seven titles, one of which (title 6) concerns nothing except the "provisions relating to a testamentary trustee." These provisions are very broad and sweeping in their character. They disclose an evident purpose on the part of the legislature to give to the Surrogate precisely the same authority in reference to testamentary trustees, with which he is invested as regards executors.

It will, indeed, be found, upon critical examination, that, with scarcely an exception, every section which relates to the accounting of an executor, and the settlement of a decedent's estate, is elsewhere repeated, *mutatis mutandis*, in reference to testamentary trustees.

The sections relating to executors are included between section 2722 and section 2748. Those relating to trustees begin at section 2802 and end at section 2820. Among those provisions touching executors which are in terms made applicable to the case of trustees are two,

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which, for the purposes of this discussion, are deserving of special consideration. Section 2811 provides that section 2736 "applies to and regulates the like matters where a testamentary trustee accounts." The section, thus made a part of the procedure of a trustee's accounting, declares that, where the value of an estate is as much as \$100,000, "each executor is entitled to the full compensation allowed by law to a sole executor or administrator," unless there are more than three executors, in which event the commissions of three must be divided.

If the position of the objectors herein is correct, the application of this section to testamentary trustees is discovered to be idle and absurd. The following would be the interpretation of the statute: "If there be two trustees, they shall be paid double the nothing which could be claimed by one trustee, and three trustees shall receive three times as much nothing as one trustee, but three times nothing is the maximum sum which can be allowed, whatever the number of the trustees who are entitled to claim commissions." Surely this section should not receive a construction so ridiculous, unless it is manifest that it can bear no other.

So, too, section 2811 makes applicable to testamentary trustees the provisions of section 2737, to the effect that, where a will gives specific compensation to an executor, he must formally renounce his claim to that compensation, to entitle himself to the statutory allowance. Now, if the claim of these objectors is well founded, this section, so far as it relates to testamentary trustees, would read as follows: "Where the will provides something as specific compensation to a trustee, he must formally renounce that something, in order to entitle

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himself to an allowance of nothing, in its place and stead."

It is scarcely conceivable that the legislature has deemed it advisable to impose such stringent conditions upon the allowance of nothing as a reward for fiduciary service. If, upon a study of the whole plan and purpose of the Code, there can fairly be given to these sections an interpretation which does not involve such absurdities, that interpretation ought surely to be accepted.

After careful consideration, I am fully persuaded that the Surrogate's power to allow commissions to testamentary trustees is implied in the provisions of title six already referred to. I think, indeed, that, ever since the act of 1850 went into effect, the Surrogate has had such power, and that it was not, as these objectors claim, first accorded to him in 1866. The act which, in that year, came upon the statute book, cannot be justly regarded as any legislative intimation that, but for its enactment, the Surrogate would lack jurisdiction in the premises. Whether its object was to set up a barrier against possible grants of allowances in excess of the amount theretofore sanctioned by the supreme court, or whether its main excuse for being was its sensible provision for the apportionment of commissions upon small estates, and its reference to the subject of commissions in general was simply incidental, and for quieting all doubts, reasonable and unreasonable, as to the Surrogate's authority, need not be here discussed.

I have made a fruitless search through the reports, to find any determination or even any intimation of opinion as to the power of Surrogates, between the years 1850 and 1866, to award commissions to testamentary trustees.

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The absence of such decisions is not singular, when it is considered that, not until 1867, were compulsory accountings of such trustees brought within the jurisdiction of the Surrogate (ch. 782, *Laws* 1867).

During the interval from 1850 till 1866, that officer could deal with voluntary proceedings only; and even as to these the trustee might, at his own option, give account of his stewardship either to the supreme court or to the Surrogate. So far as this county is concerned, our records show that the latter tribunal has seldom selected, and that many years elapsed after it had acquired jurisdiction, before it was called upon to exercise it.

The objectors in this proceeding are not correct, however, in saying that no commissions were in fact awarded by the Surrogate prior to 1866. Our records disclose many instances where the allowance of commissions to testamentary trustees was made a part of the decree upon their final accounting. Indeed, it would appear that such was the general practice.

It is quite true, as counsel have insisted, that this court has only such jurisdiction as the legislature has expressly conferred upon it (Code, §§ 2472, 2481). But is there not, after all, a complete warrant of law, for the exercise of the power which is here invoked? With the exception of the act of 1866 above referred to, there has never been upon the statute books of this State, so far as I can discover, any distinct and express legislative sanction for the award, by this tribunal or any other, of commissions to testamentary trustees. And yet, ever since the decision of Chancellor WALWORTH, in 1842 (*Meacham v. Sternes*, 9 *Paije*, 398), the court of chancery and,

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from the time of its abolition, the supreme court, have been in the constant practice of making such allowances. And in so doing, they have not, as will presently appear, regarded themselves as exercising any general equity powers. They have, on the contrary, based their action upon the authority of statutory law. It was provided by an act of 1817 (*Laws* 1817, p. 292), "that it shall be lawful for the court of chancery, in the settlement of the accounts of guardians, executors and administrators, to make a reasonable allowance to them for their services, and that, when the rate of such allowance shall have been settled by the chancellor, it shall be conformed to, in all cases of the settlement of such accounts."

The rate of compensation was thereafter fixed by the Chancellor, and promulgated in an order issued on October 16, 1817 (3 *Johns Ch.*, 630). This act was repealed in terms by the general repealing act which accompanied the revision of the statutes (3 *R. S.*, 1st ed., p. 139). In its place, appears the provision which has been already referred to (§ 58, title 3, ch. 6, part 2, *R. S.*), which adopts the former rule in chancery, and declares that "on the settlement of the account of executors or administrators, the Surrogate shall" make certain specified allowances.

Now this was the only law in force relating to this matter, when the case of *Meacham v. Sternes* (*supra*), was decided by the Chancellor. In the course of his opinion sustaining the Master's award of compensation to a trustee, the Chancellor says: "The question, therefore, appears to be presented for the decision of the court, whether such a trustee is entitled to compensation for his services, within the equity of the act of April, 1817,

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and of the provisions of the Revised Statutes as to the allowances to be made to executors, etc. . . . Upon a full examination of the subject . . . I have arrived at the conclusion that the trustee in this case and other trustees similarly situated are entitled to the same compensation for their services which is allowed by law in the case of executors, administrators and guardians." He declares that it may therefore "be considered the settled rule," that "upon the settlement of his accounts" the trustee will be allowed the "same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians;" that the commissions will "be computed in the same manner," and that the statute allowance will be deemed "the compensation tacitly understood and agreed on by the parties to all trusts of a similar nature," where nothing appears to the contrary. From the doctrine of this case, there has never been any expression of judicial dissent.

If I construe this decision aright, it holds that the right of testamentary trustees to an allowance of commissions rests upon the same foundation as that of executors, administrators or guardians. In other words, it substantially holds that section 58 of the Revised Statutes should be construed as if trustees were expressly included in the class of persons entitled to an allowance for fiduciary service. Such has been the practical construction of that section for fifty years, and the legislature have never, meantime, sought to disturb it.

Assuming, then, upon the authority of this decision, and the settled practice of the courts, that even before 1866 trustees could lawfully claim commissions, where could such claim be enforced? The language of the statutes,

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as well as of the decision above quoted, accords with what seems to me the common sense answer to this question. Their commissions were grantable by the tribunal wherein their accounts were judicially settled. Note the language of the statutes and of the Chancellor's decision. The act of 1817 declares that the allowance, when fixed by the Chancellor, shall be conformed to "in all cases of the settlement of such accounts." The existing statute as to executors (section 58, *supra*) declares that "on the settlement of the account" the allowance of commissions shall be made. The Chancellor says (in *Meacham v. Stearnes*, *supra*) that "upon the settlement of his accounts," the trustee will be awarded his compensation.

All this goes to show that the deduction of commissions, if any have been earned, has always been regarded as a necessary incident of judicial settlements of trust accounts. Indeed, the doors of this court were thrown open to testamentary trustees for the very purpose, no doubt, of securing for them an easier and speedier mode of final accounting, than had been previously afforded.

But this manifest object of the statute of 1850, and of the corresponding provision of the present Code, is strikingly inconsistent with the relegation of such trustees to the supreme court, for the determination of their claims for compensation. I hold, therefore, that, at the moment when this court obtained the jurisdiction over the accounting of testamentary trustees which was given to it by the statute of 1850, it acquired the same authority to make allowances in the premises as had theretofore been enjoyed by the supreme court. It need scarcely be added that all that has been said touching

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the powers of the Surrogate, under the act of 1850, applies, *a fortiori*, to the existing situation. Step by step, the jurisdiction of this court over testamentary trustees has been enlarged, until, to-day, no intention is more clearly evinced in the entire eighteenth chapter of the Code than that of putting such trustees, in all respects, on precisely the same footing before the Surrogate as are executors and administrators.

Second. It must next be determined whether the fact of one's reception of commissions as executor is, *ipso facto*, a bar to his claim for commissions as trustee.

Section 2514 of the Code declares that the expression "testamentary trustee," as used in the Code, includes, among other persons, an executor designated by a will, when such executor "is acting in the execution of a trust created by the will, which is separable from his functions as executor." This is a distinct recognition that the two functions may be united in the same person. Indeed, the current of decisions shows that the courts have repeatedly so held. Now, in the absence of any prohibition by law or by the terms of a will itself, it would seem to be an immaterial inquiry, in passing upon the claim for commissions by a trustee, as such, whether he had or had not exercised also the functions of an executor. So thought the court of appeals in the case of *Hurlburt v. Durant*, fully reported in the *New York Daily Register* of March 9, 1882. It seems idle to cite other authority, in view of this very recent and explicit declaration of our highest court. The decision is utterly inconsistent with the doctrine that double commissions are under no circumstances allowable.

Third. Next arises the inquiry whether, upon all

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the facts of the case at bar, the claim of commissions, which is here set up in behalf of Mr. Roosevelt's trustees, can be maintained.

The case last mentioned may fairly be deemed almost as conclusive upon this point, as upon the one in support of which it has been already cited. In pronouncing the unanimous opinion of the court of appeals, Judge DANFORTH says, after referring to the terms of the will: "It is manifest that the testator intended to create a trust; . . . he did not leave the legacies to be paid by the executor in the course of administration, and out of the general assets, but appointed him as trustee to hold and re-invest, during the continuance of the trust, the sum of \$275,000 represented by bonds and mortgages; and while it may be conceded that, so long as these characters were co-existent, commissions might be retained as executors only, it is otherwise where there has been a separation of duties performed in the two capacities."

After commenting upon the decision of *Drake v. Price* (5 N. Y., 430), and referring, with undisguised approval, to the views expressed in Judge PAIGE's dissenting opinion in that case, Judge DANFORTH adds (in considering the circumstances under which a separate commission as trustee might be allowed an executor), "no doubt a separation by order or decree of a court or Surrogate, as in *Ward v. Ford*, and *In re Carman*, would be most satisfactory evidence of the real relation of the party to the fund." Both of the cases thus approvingly mentioned arose in this county, and were decided by Surrogate CALVIN (*Matter of Carman*, 3 Redf., 46; *Ward v. Ford*, 4 Id., 34). They contain an able review

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of all the authorities bearing upon the subject, and their conclusions seem to me to be sound.

Indeed, those conclusions were impliedly indorsed by the court of appeals, even before its recent decision in *Hurlburt v. Durant*.

In *Hall v. Hall* (78 *N. Y.*, 535), that court held that certain persons who had been awarded commissions as executors were not, under all the circumstances of that particular case, entitled thereafter to commissions as trustees. There is not, however, the faintest suggestion, that the reception of commissions as executor is, of itself, a bar to any subsequent claim as a trustee. On the contrary, the only inference which can fairly be drawn from the language of Chief Judge CHURCH is that, in the judgment of the court of appeals, double commissions may properly be awarded, where the will contemplates a separation between the functions of executor and trustee, and such separation has actually taken place. This is apparent from the fact that a distinction is drawn by the court between the case then before it, and the two cases already referred to, as decided by Surrogate CALVIN.

In those instances "where executors have been allowed to retain commissions as trustees," says Judge CHURCH (78 *N. Y.*, 539), "there has been a separation of the duties performed in the two capacities." And thereupon the learned judge calls attention to the fact that, in the case of *Carman* (*supra*), the fund had been ordered, by decree of the Surrogate, to be set apart and kept invested for the beneficiary; that such separation had been made; that a bank account had been opened by the trustees, as such; that the trust funds had been

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kept apart from the general funds of the estate, and that the dealings of the trustees with such trust funds had not been included in their accounting as executors.

The case of *Ward v. Ford* (*supra*), is also referred to by Judge CHURCH as being one in which there had been a final judicial settlement upon an executor's accounting, a direction in the decree that the persons who had been executors should retain the funds in their hands as trustees, and an actual compliance on their part with such direction. On applying, to the facts of the case at bar, the doctrine of the authorities which have been cited, it will appear that there has here been as thorough and effectual a separation of the functions of executor and trustee as could well be imagined. Such separation was designed by the testator and directed by the court, and such separation has been in fact accomplished. In support of this position little need be added to the statement of facts at the beginning of this opinion.

It seems to me that, in its whole scheme and spirit, the will contemplates a speedy termination of the executorial duties and establishment of the trusts. As it was the purpose of the testator to appoint the same persons both as his trustees and as his executors, it is not strange that he sometimes used the two words interchangeably, as a mere designation of persons, and without literal exactness. But on the whole, his purpose is as clear and definite as words can make it. And that purpose has been accomplished. With unimportant exceptions, the entire corpus of the estate, applicable to the trusts, has been actually assigned to them.

Whether a separation of the two functions of exec-

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utor and trustee has been intended by a testator, and whether it has been in fact effected, are sometimes questions of doubt and difficulty, and their solution may involve distinctions somewhat shadowy and refined.

But the present case is, in my judgment, free from such perplexities. It does not essentially differ from that of *Quackenboss v. Southwick* (41 *N. Y.*, 117), in which the court of appeals held that an executor, upon whom were enjoined by the will certain distinct and separate duties as trustee, might be removed from the latter office, and still remain in the full enjoyment of the other.

Perhaps, indeed, there is no better mode of presenting the question whether, in the case of a person named as an executor, the trust duties enjoined by the will are a mere enlargement of executorial functions, or, on the other hand, involve the existence of a trustee as such, than to consider what would be the effect of the person's resignation or removal.

In the present case, so completely have the trusts been divorced from the body of the estate that, within sections 2817 and 2819 of the Code, Mr. James A. Roosevelt might be removed as the trustee of Charles, or Frederick, or Marcia, for mismanagement of one of the three trusts, and not be thereby dislodged, either from his executorship, or from his control of the other trusts. So, too, he might be removed from the executorship, and his authority as trustee would remain unaffected (§ 2688).

My conclusion, therefore, is that persons named by Mr. Roosevelt as his executors are now entitled, as trustees, to such commissions as could have been lawfully

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claimed by any other persons similarly exercising the functions of testamentary trustees.

Fourth. The basis upon which commissions should be calculated is the only matter which remains to be considered.

The courts of this State have uniformly construed statutes awarding commissions for "receiving and paying out" as if they granted one-half of such commissions for receiving and the other half for paying out (*Matter of Kellogg*, 7 *Paige*, 265; *Matter of Roberts*, 3 *Johns. Ch.*, 43; *Howes v. Davis*, 4 *Abb. Pr.*, 71; *Ward v. Ford*, 4 *Redf.*, 43).

It may be remarked, in passing, that, upon the strength of these authorities, it would appear that the trustees, in the case at bar, may have become entitled, as such, to one-half commissions when the trusts were first established. And, as this was before the Code went into operation, it may be claimed, with some show of reason, that their right to such commissions became vested before the act of 1866 was repealed, and was therefore in no manner affected by such repeal (Code, § 3352).

For the reasons above set forth, I find that each of the trustees is entitled to one-half commissions upon the entire capital of the personal trusts, and upon all the realty as well (*Wagstaff v. Lowerre*, 23 *Barb.*, 223; *Matter of De Peyster*, 4 *Sandf. Ch.*, 511; *Estate of Mofat*, 24 *Hun*, 325; *Ward v. Ford*, 4 *Redf.*, 34; *Ogden v. Murray*, 39 *N. Y.*, 203).

Decreed accordingly.

TAYLOR v. BRODHEAD.

ULSTER COUNTY.—HON. ALTON B. PARKER, SURROGATE.—
July, 1878.

TAYLOR v. BRODHEAD.

In the matter of the probate of the will of SARAH CUDNEY, deceased.

Where one of the subscribing witnesses to a will, to which there was an attestation clause, testified to the observance of all the requisite formalities in its execution, including the subscription by testatrix in both witnesses' presence, while the other did not remember that she subscribed in his presence, or that the attestation clause was read,—*He'd*, that the due execution was proved.

It seems, that the declaration, in the presence of another, by one who has affixed his signature to a paper, that the same is his last will, accompanied with a request that the latter attest it, is a sufficient acknowledgment of his signature.

An attestation clause is no part of the execution of a will, but is useful as an aid to the witnesses' memory, and as raising a presumption, where one or both witnesses are dead, of the truth of its recitals.

APPLICATION, by Andrew Brodhead, executor, etc., of decedent, for the probate of his will: opposed by Mary Taylor, his daughter. The facts appear sufficiently in the opinion.

JOHN LYON and GEORGE C. KEELER, *for proponent*.

JOHN T. DE WITT and C. A. VAN WAGONER, *for contestant*.

THE SURROGATE.—The contestant objects to the probate of the will, on the ground, among others, that undue influence was used by Sarah J. Hawxhurst, which resulted in deceased making a will, the provisions of which were acceptable to Mrs. Hawxhurst, but were contrary to the natural inclination and desire of deceased.

There is evidence in the case, indicating that deceased was afraid to disobey Mrs. Hawxhurst, and dared not give away her own money, for fear it would displease her. On the other hand, the preponderance of evidence seems to indicate that the deceased was not afraid of, but, on the contrary, was very fond of her daughter, Mrs. Hawxhurst, who had provided for her during so long a period of time, that it was not unnatural or improper for deceased to bequeath to her or her family a larger amount than to other children, who had done less for her. All evidence upon the question of undue influence, however, covers a period of time subsequent to the date of the will. As there is not a particle of evidence indicating that undue influence was used prior to or at the time of making the will, it is unnecessary to consider the evidence upon that branch of the case.

The contestant urges that the will cannot be admitted to probate, for the reason that there is not sufficient proof of the execution of the will. One of the subscribing witnesses, Mr. Cantine, testified that he did not see Mrs. Cudney sign her name; that "she did not sign it in my presence;" and that "I do not recollect that the attestation clause was read over." He does testify that she declared the paper signed by him to be her last will and testament, and that "she asked me to sign the same as a witness." The evidence of the other subscribing witness is to the effect that all of the formalities were complied with. It has been repeatedly held that, where one of the subscribing witnesses swears that all the formalities required by statute have been complied with, even though the other attesting witness may not be able to recollect the fact, the will should be admitted to pro-

bate (*Weir v. Fitzgerald*, 2 *Bradf.*, 73 ; *Chaffee v. Bapt. Miss. Conv.*, 10 *Paige*, 85 ; *Jauncey v. Thorne*, 2 *Barb. Ch.*, 40). McElhone swears positively that the requirements of the statute were fully complied with ; Cantine, in substance, that he does not recollect seeing the testatrix sign her name, or that the attestation clause was read over—not positively that it was not done, but that he does not remember of its having been done. It has long been held that, under such circumstances, the court must presume due execution on the part of the testatrix ; that the mere want of recollection, on the part of one of the subscribing witnesses to the will, is insufficient to overcome the presumption raised by the attestation clause, together with the positive evidence of the other witness (*Blake v. Knight*, 3 *Curteis*, 547 ; *Remsen v. Brinckerhoff*, 26 *Wend.*, 332).

Conceding the evidence of Cantine to be that the will was not signed in his presence, and that the attestation clause was not read over, I am of the opinion that the execution of the will has been duly proved, for the testatrix in the presence of both witnesses, declared the paper signed to be her last will and testament, and she requested both McElhone and Cantine to sign the same as witnesses, which they did in her presence, and in the presence of each other. In *Baskin v. Baskin* (36 *N. Y.*, 416), the court says that it is sufficient, if the subscription be either made or acknowledged in the presence of those who attest it, and that a declaration that the paper to which he has affixed his signature, is his last will and testament, accompanied with a request that the witnesses attest it, is a sufficient acknowledgment of a signature thus affixed. The objection that the attestation clause

TAYLOR & BRODHEAD.

was not read over is untenable, as it is no part of the execution of a will. It is a statement of facts transpiring at the time of the execution of the will, that may be useful as a memorandum, to aid the attesting witnesses in recalling what took place at the time of the execution of the paper, and, in case of the death of one or both of the witnesses, may be *prima facie* evidence that the formalities recited therein took place. Wills are frequently admitted to probate, which have no attestation clause. In *Baskin v. Baskin* (48 *Barb.*, 200), there was no attestation clause, the witnesses attesting beneath the subscription of the testator.

It is, therefore, well settled by authority that it is not necessary that the signature of the testator should be affixed in the presence of attesting witnesses, or the attestation clause read. Probate of a will is to be granted or denied, in view of all the facts attending its execution; and the production of a paper to which the testator has affixed his signature, and a statement to the witnesses that such paper is his last will and testament, accompanied with a request that the witnesses attest the same, are a sufficient acknowledgment to render the will valid. The evidence in this case, however, is much stronger, one of the witnesses testifying that all of the usual formalities were enacted, and that the testatrix signed the will in the presence of both witnesses.

I am satisfied, therefore, that the execution of the will has been duly proved, and, as there is no evidence affirmatively establishing fraud, influence, restraint or imposition, it should be admitted to probate.

Decreed accordingly.

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ULSTER COUNTY.—HON. ALTON B. PARKER, SURROGATE.—
April, 1879.

LEGG v. MYER.

*In the matter of the probate of the will, and codicils
thereto, of EPHRAIM P. MYER, deceased.*

While it is true, as laid down in *Delafeld v. Parish* (25 N. Y., 9), that it is not the duty of the court to strain after probate,—neither should it, on the other hand, strain against probate, where the will seems unfair, but, if the testator appears to have had capacity, care should be taken to carry out his wishes.

If one be *compos mentis*, he can make any will, however complicated; otherwise none, however simple. He who asserts, of a testator, the unnatural condition of *non compos mentis*, must prove it.

The will propounded was executed in 1869, and the first codicil in 1872. The testator, on December 15, 1877, was stricken with apoplexy, resulting in paralysis. Shortly before this, he had arranged to add a second codicil to his will, and gave a memorandum to a draftsman for that purpose. The alleged execution of the second codicil, which was contested, was on January 25, 1878. The death occurred October 14, of that year. When first taken, testator was unconscious, but he rapidly improved in mind and body, so that his physician ceased to attend him, and, though he never regained power of speech, or his former mental vigor, he became able to and did read, the Bible much, and the paper daily, often calling attention to items which interested him; received visits, shook the hands of visitors, understood conversation, and manifested an interest in his pecuniary affairs; in short, was able to comprehend the extent of his property, the number of his children, and their relations to him, and had sufficient mind to understand the ordinary business transactions of life. It was shown that he took the codicil, after it was read to him, and read it himself, pointing to certain words which at first he was unable to decipher, after which the same was duly executed.

Held, that the testator, at the time of the execution of the contested instrument, was possessed of that moderate degree of capacity necessary to enable him to make a testamentary disposition, and that the codicil must be admitted to probate.

The rule, in *Delafeld v. Parish*, as to the essentials of testamentary capacity, and the burden of proof in respect thereto,—expounded.

APPLICATION, by Francis Myer, executor, etc., of de-

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cedent, for the probate of his will and codicils thereto ; opposed by Rachel J. Legg, his daughter.

A will and two codicils were offered for probate ; the will dated February 5, 1869, the first codicil dated August 16, 1872, and the second and last codicil dated January 25, 1878. No contest was made with reference to the will and first codicil, and they were admitted to probate without objection.

Objection was made to the second codicil, upon the grounds that the testator did not have testamentary capacity at the time of the alleged execution of the paper, and also that it was not the last will and testament of the alleged testator, Ephraim P. Myer. Other objections were made, but evidence was introduced only in support of, or opposition to, the above objections. Further facts appear sufficiently in the opinion.

B. M. COON, *for proponent.*

HERMAN WINANS, *for Mary C. Fields.*

PETER CANTINE, *for contestant.*

THE SURROGATE.—Ephraim P. Myer, an old resident of Saugerties, was, on December 15, 1877, stricken with apoplexy, resulting in paralysis. Dr. Chipman, his attending physician, testifies that, when first taken, he was unconscious, unable to move, and had no sense of touch ; his right side was paralyzed, the left side affected by the shock, but not permanently ; during the first few days, there was a great improvement in mind and body. From the evidence of all the witnesses, it appears that the deceased was never able to talk again, although one or two most familiar with him testify to the use by

him of a few words, which they understood. On the 25th of January, following, the codicil in question was executed, the testator living until October 14, 1878. It is insisted, on the part of the contestant, that the testator, on January 25, 1878, did not have a disposing mind and memory, and, not being able to talk, could not explain his wishes. Before discussing the evidence particularly upon this question, we will examine the law relating to a disposing mind, as settled and adjudicated by the courts of this state.

In *Delafield v. Parish* (25 N. Y., at p. 97), the majority of the court lay down the following legal propositions: In law, the only standard as to mental capacity, in all who are not idiots or lunatics, is found in the fact whether the testator was *compos mentis* or *non compos mentis*, as those terms are used in their fixed legal meaning. Such being the rule, the question in every case is—had the testator, as *compos mentis*, capacity to make a will? not—had he capacity to make the will produced? If *compos mentis*, he can make any will, however complicated; if *non compos mentis*, he can make no will, not the simplest. At common law and under our statutes, the legal presumption is that every man is *compos mentis*, and the burden of proof that he is *non compos mentis* rests on the party who alleges that an unnatural condition of mind existed in the testator. He who sets up the fact that the testator was *non compos mentis* must prove it.

These rules, differing though they do very materially from those laid down in the opinion of Judge DAVIES in the same case, are nevertheless considered the settled law in this State. It is, then, a question of fact, for the

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court to determine from the evidence, whether or not the testator on that day was *compos mentis*; whether he had a sound and disposing mind and memory, or not. It is a circumstance of no small importance that the testator, before his sickness, and while it is conceded by all that he was of sound mind, determined to add a second codicil to his will, and asked Mr. J. K. Merritt, at his store, to draft it for him; this Mr. Merritt promised to do; and shortly afterwards deceased was stricken with paralysis. At the time of this conversation with Mr. Merritt, he gave him a piece of paper, containing memoranda for the codicil. This paper was introduced in evidence, and differs in two respects from the codicil as finally executed. Thus it appears that, while there was no question about his being sound in mind and memory, he determined to change somewhat the disposition of his property, as made by the first will and codicil. This fact is only important, however, in so far as it demonstrates that the intent to change the will was not the creation of the disease, for, whatever may have been his intention before, if he was not *compos mentis* on January 25, 1878, he could not make a will.

It is, therefore, necessary to consider briefly the testimony of the witnesses, bearing upon the mental condition of Mr. Myer from December 15, 1877, to and including the 25th day of January, following.

Francis Myer, the executor named in the will, and whose interests are not affected by the codicil, testified, among other things, that when father was first taken he was unconscious. "I saw him nearly every day, the first week. From the time he became conscious, he gradually improved, both in mind and body. Four or five

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days after he was taken, he began to nod, and shake his head for yes and no, in response to questions put to him. I was at his house, at an average, twice a week, from the time he was taken sick, until the 25th of January. He, at times, called my attention to articles in the paper that he had been reading. I remember, now, of his calling my attention to a death notice of one of his old neighbors, and then looking up, as if he wanted to hear about it. He also pointed out to me, at one time, the tax collector's notice in the paper, giving the last day to pay at one per cent."

Rev. Sanford H. Cobb, his pastor, who called on him very frequently, and noticed and carefully weighed each symptom of mental improvement, testified that he saw him within thirty-six or forty-eight hours after he was taken sick, and saw him, on an average, at least once a week, until the 1st of March, following. "When I first saw him, he was helpless in body, and there was no evidence of mental state. During the first part of his seizure, I was there frequently. On the second visit, I do not know as I observed any special change in his condition. The improvement I noticed subsequently, can, perhaps, better be characterized as an improvement in general condition. At the first visit, the physical blow appeared to be of such a character as to preclude any mental manifestations; afterwards, the weight of the blow seemed to be relieved, so that mental manifestation was possible. After the first two or three visits, I talked with him a great deal. He always appeared to understand what I said to him. My impression is that he invariably shook hands with me when I came in."

Austin Preston, an old and intimate friend of the

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deceased, and a member of the same church, in the prosperity of which each was deeply interested, testified, in substance, that he called on Mr. Myer about a week after he was taken sick, and was very much surprised to find that his mind was so good. He says: "I had not got near to the bed, before he put out one hand, to shake hands with me. I talked to him. I could talk to him quite well, being used to talking with a man deaf and dumb. He seemed to understand what I said. I had no difficulty in making him understand, or understanding his replies. He appeared to be better every time I called. I often found him reading."

Erastus D. Chipman, the family physican, and the only physician sworn in the case, says: "I have been a practicing physician for sixteen years; I attended Ephraim P. Myer during his last sickness. When I first called, he was unconscious mentally; his tongue was paralyzed, so that it was impossible for him to articulate so as to be understood. I visited him on the 15th, 16th, 18th, 19th, and 21st days of December, 1877. During those few days, there was a great improvement in mind and body. After that, while the improvement was gradual, it was not so marked. His mind was not as strong and vigorous as if he had not had the attack. On January 6th, he was so much improved in mind and body that I ceased my visits. I want to be understood as saying that this man's mind was not as strong after the paralysis as previous to it—that his mind was not destroyed, but enfeebled."

Twelve witnesses testified as to the mental and physical condition of Mr. Myer, after he was stricken with

paralysis, from which the court is to determine the mental soundness or unsoundness of the deceased.

These witnesses were examined by counsel skillfully and at great length ; but the evidence above quoted, from witnesses called by the contestant, clearly and fairly states the substance of the testimony of all the witnesses.

In addition to the opinions given, we have the fact that he read the Bible a great deal, the paper almost every day, frequently calling the attention of members of his family and visitors to items that particularly interested him, and giving them to understand that he wanted to hear more about it ; calling his son's attention to a collector's notice stating the time during which taxes could be paid at one per cent., and signifying his desire to have his taxes paid immediately.

He also read some portion of the life of Dr. Henry Ostrander, particularly a sermon on Old Age, in which he seemed greatly interested, and would frequently call the attention of persons to some passage in it.

A careful examination of the evidence submitted, aided by the thorough and able arguments of counsel, satisfies the court that deceased was *compos mentis* on January 25, 1878. Beyond all question, his mind was somewhat enfeebled by the effect of the stroke ; it was not as vigorous as before his illness ; yet, from the testimony of all the witnesses, it seems that, after the first few days, he could and did understand everything that was passing on about him. He had sufficient mind to comprehend the extent of his property, the number of his children and their relations to him,—sufficient mind,

at least, to comprehend the ordinary business transactions of life.

Mere weakness of mind is not sufficient to invalidate a will, if the testator had sufficient mind to comprehend the nature and effect of the act he was performing, and the relations he held to the various individuals who might naturally be expected to become the objects of his bounty (*Forman v. Smith*, 7 *Lans.*, 443). When it is considered that a very large proportion of wills are made in old age or upon the sick bed, after the mind has lost a portion of its former vigor, and has become somewhat enfeebled by age or the effect of disease, the wisdom of the above rule becomes apparent.

While it is true, as stated in the opinion of the court, in *DeLafield v. Parish* (25 *N. Y.*, 35), that it is not the duty of the court to strain after probate, nor in any case to grant it where grave doubts remain unremoved, and great difficulties oppose themselves to so doing; neither is it the duty of the court to strain against probate, where the provisions of the will seem to the court unfair, but, on the contrary, where the court is satisfied that the testator had sufficient mind and memory to understand his relations to other persons, and the nature and extent of his property, great care should be taken that the wishes of the testator be fully carried out. In such a case, says the court, in *Watson v. Donnelly* (28 *Barb.*, 653), "his will must stand for the reason of the act, and it is not sufficient to impeach his competency, that the will is not such, in all respects, as might have been expected."

There is no evidence of undue influence, and the testimony of the subscribing witnesses, Mr. Coon, the lawyer

who drew the codicil, and Mr. Merritt, who had been consulted on the subject by Mr. Myer before his sickness, shows conclusively that the codicil in question was legally and properly executed.

The evidence of these witnesses, given with great care and minuteness of detail, was also of great advantage to the court, in determining whether or not the testator had sufficient testamentary capacity to make a will on January 25, 1878.

From their testimony, it appears that, after the codicil was carefully read over to Mr. Myer by Mr. Coon, he then, of his own motion, took the codicil and read it over; two or three words he was unable to make out, and when he came to each word, pointed it out to Mr. Coon, who pronounced it, after which he continued reading; when he had finished reading, he signified his approbation, and the codicil was then executed with legal formality. The evidence fully establishes that Ephraim P. Myer, on January 25, 1878, as *compos mentis*, had sufficient capacity to make a will; that the making of such codicil was not the result of undue influence; and that such codicil was legally executed.

No objection having been made to the will and first codicil, and they having been properly proved, the will and both codicils are therefore admitted to probate.

Decreed accordingly.

ULSTER COUNTY.—HON. ALTON B. PARKER, SURROGATE.—
July, 1879.

HOAR v. HOAR.

In the matter of the estate of FRIEND HOAR, JR., deceased.

To constitute a valid gift *inter vivos*, the act of the donor must have no reference to the future, must divest himself of all control over the subject-matter, and include a delivery to the donee.

Accordingly, where testator, in his life-time, had a deposit in a savings bank, which was claimed, after his death, by his widow, as a gift *inter vivos*, and the only evidence in support of her claim was a declaration by testator to third persons, that he had given her the money in the bank,—that he had given her the bank-book,—that it was hers; the bank-book not having been delivered,—*Held*, no gift, for want of delivery.

It seems, that a delivery of the bank-book would have perfected the gift of the deposit.

APPLICATION by decedent's widow, to amend an inventory; opposed by Friend Hoar, his father. The facts appear sufficiently in the opinion.

CHARLES A. FOWLER, *for petitioner*.

J. NEWTON FIERO, *for respondent*.

THE SURROGATE.—Mary E. K. Hoar, the widow and administratrix of Friend Hoar, Jr., deceased, petitions the Surrogate for an order directing that the bank-book of deceased, representing money deposited in the Ulster County Savings Institution, be stricken from the inventory of said estate, and declaring the same not to be assets of said deceased, on the ground that such bank-book was given to the petitioner by deceased, some time

prior to his death. The evidence given on the part of the petitioner is not disputed.

To constitute a valid gift *inter vivos*, it must be immediate, and have no reference to the future. The donor must divest himself of all control over the subject-matter of the gift, and invest the donee with all right, title and interest in, and dominion over the property given. There must be an actual delivery of the property, so far as the same is capable of delivery, that the donor may not be in a position to revoke the gift.

The question for the court to decide is whether or not the evidence shows that these well-settled rules have been complied with in this case. The only evidence, in support of the petitioner's claim, is the testimony of John W. Kerr and William Kerr, each of whom testifies, in substance, that deceased said to him, that he had given his wife the money in the Ulster County Savings Institution, and that he had given her the bank book—that it was hers. Had the proof been that the deceased said to his wife: "I give you the money in the Ulster County Savings Institution," and "I give you the bank-book which represents the money deposited there"—"it is yours," it would not have been sufficient to establish a gift *inter vivos*, because an essential element to create such a gift would be wanting, to wit, *delivery*; such a delivery and change of possession as would divest the donor of all control over the subject-matter of the gift. Such language would indicate an intent to make a gift, and the person using it might consider it sufficient for that purpose, but the law prescribes that, in addition to the language, there shall be an act, an act of delivery,

which shall change possession and right of control from the donor to the donee.

It is not enough to show that a person meant to make a gift, or that he thought he had. For if that which he actually did is lacking in any of the essential elements which the law prescribes as necessary to make a valid gift *inter vivos*, the gift cannot be upheld.

In this case, there is no evidence of a delivery or change of possession of the bank-book in question, outside of the declarations above mentioned. It is clear that a delivery of the bank-book by deceased to his wife was necessary to perfect the gift. It is equally clear that such a fact must be proven before the gift can be sustained. An examination of the declarations of the deceased, as proven, disclose no declaration of delivery. The word, give, does not mean, deliver. The words "I have given it to her" no more prove that the property has been delivered than the words "I give it to you" prove the act of delivery. In short, the declaration is no stronger proof of a gift, than if the evidence were that deceased said to his wife: "I give you my bank-book, it is yours." A donor might conclude that, such words having been spoken, the gift was complete, and would therefore say "I have given it to her—it is hers." To sustain a gift on such a declaration would be to base the decision upon the legal conclusion of the donor, and not upon the facts attending the gift.

Having reached the conclusion that the proof does not show a valid gift from deceased to the petitioner, it is unnecessary to consider the other point raised.

The prayer of the petitioner is denied.

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ULSTER COUNTY.—HON. ALTON B. PARKER, SURROGATE.—
April, 1881.

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*In the matter of the probate of the will of GEORGE
W. EWEN, deceased.*

It is not influence by a beneficiary, but undue influence, amounting to moral coercion, that will vitiate the act of a testator.

The burden of proving undue influence on the part of beneficiaries in a will rests upon contestant, where it appears that testator was of sound mind at the time of its execution.

Evidence of expressions of testamentary purpose, by a testator, are of great weight in enabling the court to determine whether a will is the result of undue influence.

The decedent, who died in May, 1880, aged eighty-five years, leaving him surviving a sister and nephews and nieces, by his will gave all his property to Mr. and Mrs. P., persons not related to him, with whom he had boarded for years. The will was executed with due formalities, the testator being of sound mind, though in feeble health at the time. There was no direct evidence of undue influence, although it was shown that the beneficiaries had abundant motive and opportunity to exert such influence, and their conduct impressed the court that they would not have deemed it wrong to influence testator to give them his property. The character and conduct, on the stand, of some of proponent's witnesses, also aroused suspicion that the whole truth had not been proved. But testator gave instructions for the will to the scrivener, they being alone at the time, and each of the subscribing witnesses, one of whom was a physician, testified positively to the facts of execution, and that testator was of sound mind and not under restraint. It also appeared that, during three years preceding his death, testator had repeatedly announced his intention to make the disposition of his property effected by the will.

Held, that it was not the province of the court to dispose of decedent's property in accordance with its notions of justice, nor could it deal with suspicions of undue influence not shown to have been exercised; that the proponents had made out a strong affirmative case, which contestants had not overthrown; and that the petition for probate should be granted.

THE decedent died May 12, 1880, leaving him sur-

viving a sister and several nephews and nieces, none of whom ever resided in the city of Kingston. After his death, Marius D., and Sarah A. Perrine, with whom he had boarded for a number of years, presented for probate as the last will and testament of deceased, a paper purporting to give, devise and bequeath all of his property to them. Further facts appear sufficiently in the opinion.

A. H. VAN BUREN and CHARLES A. FOWLER, *for proponents.*

SCHOONMAKER & LINSON, *for contestants.*

THE SURROGATE.—The evidence shows that the will was executed with the formalities required by statute. It also shows that the testator was, at the time of making his will, a person of sound mind. The only ground upon which the contestants now oppose the probate of the will is that undue influence was exercised over the testator, by the beneficiaries of the will.

We shall consider, then, before examining the evidence, first, what constitutes undue influence, and second, which side has the burden of proof.

The court says, in *Newhouse v. Godwin* (17 *Barb.*, 236): "The mere fact that the mind of the testator has been influenced by the arguments or persuasions of the persons principally benefited, however indecorous, indelicate or improper they may be, will not, ordinarily, in the absence of fraud, vitiate a will;" in *Blanchard v. Nestle* (3 *Denio*, 37), that "a person has a right by fair argument or persuasion to induce another to make a will, and even to make it in his own favor;" and in *Kinne v. Johnson* (60 *Barb.*, 69), that "the influence arising from gratitude, affection or esteem, is not undue."

Many other authorities might be cited, but these are sufficient to establish the proposition that it is not sufficient to vitiate a will, to show that the beneficiary has undertaken to fairly influence the testator to make a will in his behalf; in other words, that it is not *influence by the beneficiary* that vitiates the act of the testator, but undue influence, amounting to moral coercion, which restrains independent action and destroys free agency; or that, by importunity which he was unable to resist, the testator was constrained to do that which was against his free will and desire (*Children's Aid Society v. Loveridge*, 70 N. Y., 387).

The burden of proving that the execution of a will, in favor of the beneficiaries, was procured by undue influence, rests upon the contestants, where it appears that it was duly executed by a person of sound mind at the time of the execution (*Tyler v. Gardiner*, 35 N. Y., 559). There is no evidence in this case, showing that either Perrine or his wife ever asked George W. Ewen to make a will in their behalf, and, in the absence of direct testimony showing that the beneficiaries used undue influence in procuring the making of the will in their favor, it is the duty of the court to examine all the circumstances in the case, to see if they show affirmative facts from which such influence can be inferred. The evidence shows that both of the beneficiaries had abundant opportunity to exert undue influence, but does the evidence show facts from which the court can infer that they did use it? The testator by his will ignores, entirely, his relatives, and gives all of his property to the people with whom he boarded, and apparently without any adequate

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reason for it. By so doing he seems to have acted unjustly and unnaturally.

It must be borne in mind, however, that it is not the province of the court to dispose of a decedent's property according to the court's notions of right and justice; but, on the contrary, every person has a right to make such a disposition of his property as he chooses, and full effect must be given to the intentions of the testator, where it appears that the will has been duly executed, that the testator at the time of execution was *compos mentis*, and that the making of the same was his own independent act.

It has been frequently held that the fact, that the will gives all of the property of the testator to persons not related to him, does not raise an inference of undue influence (*Deas v. Wandell*, 1 *Hun*, 120). George W. Ewen, at the time of making his will, was about eighty-five years old, and was in feeble health, and, it is claimed by the contestants, was in such a condition, both physically and mentally, as to make him dependent upon some one, and consequently could have been easily induced, by those by whom he was surrounded, to make a will in their favor. While it is true that he might have been persuaded, by reason of his age and feeble health, to do an act he would not have done otherwise, I am unable to find any fact from which the inference can be drawn that he was thus influenced by the beneficiaries. The evidence of old age, feeble mind and body, considered alone and apart from any other fact, does not even raise a presumption against the will. In *Horn v. Pullman* (72 *N. Y.*, 269), the court says that "there is no presumption against a will, because made by a person of advanced

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age, nor can incapacity to make a will be inferred from an enfeebled condition of mind or body." If the testator has sufficient intelligence to comprehend the condition of his property, his relation to those who are, or may be, the objects of his bounty, and the scope and meaning of the provisions of his will, and if it is his free act, it will be sustained. The question in all such cases is, simply,—was the will the free act of a competent testator? The fact that its provisions were inequitable and unjust furnishes no ground for disturbing it.

Dr. Shafer, the only physician examined, testified that he was present at the time of the execution of the will; that Ewen's mental condition was sound. The witnesses to the will are Augustus H. Van Buren and Dr. Levi Shafer. Mr. Van Buren testified that he wrote the body of the will at his office, took the paper to the house where Mr. Ewen was living, met Dr. Levi Shafer there, and together they went into the room occupied by Mr. Ewen; found him sitting in a chair; "he spoke to us, and we to him; I asked him if he was ready to execute the paper he desired me to draw; he said 'Yes'; I read the will over to him twice, and then handed it to him; he held it for some time, read it over, and then signed it; Mr. Ewen then said, 'Gentlemen, I declare this to be my last will and testament, and request you and the doctor to sign as witnesses;' which we did; Mr. Ewen was present when we signed. He was sound mentally, and was under no restraint." The witness also states that no one else was present in the room on that occasion, aside from Mr. Ewen, Dr. Shafer and himself.

Dr. Shafer, the other subscribing witness, testified that, at the time of the execution of the will, he entered

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Mr. Ewen's room and found him sitting in a chair, and that, after making some general remarks about his health, "Mr. Van Buren proceeded to read the will ; he read the will aloud ; Mr. Ewen then took the paper in his hand and held it some little time, and then signed it, after which he asked Van Buren and myself to affix our names ; he said the paper was his last will and testament, and we signed our names as witnesses to the transaction ; no one was in the room while I was there except Ewen, Van Buren and myself. His mental condition was sound, and he was not under any restraint."

At the time of the execution of the will, therefore, it appears that neither of the beneficiaries was present to exercise any restraint over him ; and his physician testifies that he was at that time mentally sound, and not under any restraint. There is no evidence in the case, as to his mental condition on that day, aside from the testimony of the subscribing witnesses. It is clear that this testimony, considered alone, establishes affirmatively that the will was duly executed, that the testator was of sound mind, and that the making of the will was his own free and independent act.

The age of Mr. Ewen, his feeble condition, the fact that he boarded with the Perrines, the abundant motive and opportunity of the beneficiaries for influencing him to give them his property, the fact that their conduct impresses the court that they would not consider it morally wrong to exert such influence if necessary, and the character and conduct, while on the stand, of some of the witnesses for the proponents, excite the suspicion that perhaps the whole truth has not been proven ; that there may have been much more done by the beneficia-

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ries in bringing about this result than appears on this contest. But the court cannot deal with suspicions ; and these facts, together with the other circumstances proven, are not sufficient to warrant or justify the court in finding that they overcome the positive testimony of the subscribing witnesses.

The testimony of Mr. Carter, John W. Kerr, Mrs. Decker, Mrs. Thompson and Andrew Bostwick shows that he had stated to different persons, during the three years preceding his death, that he intended to give his property to Mr. and Mrs. Perrine when he had done with it. This evidence indicates strongly that the disposition which he finally made of his property had been in contemplation for a long time. Evidence of the testamentary wishes of a testator have always been considered by the courts as having great weight, in considering whether or not the making of a will was the free and independent act of the testator, or whether the same was the result of undue influence. In *Wilson v. Moran* (3 *Bradf.*, 172), the court says that "the probability of the will being the free act of the testator is sustained also by testimony as to the testamentary wishes, orally expressed at other periods and to other parties."

A very large amount of evidence has been taken on this contest, but I do not consider it necessary to refer to it further, as there is positive testimony showing that, for nearly three years, the testator had stated that it was his intention to give his property to the Perrines when he had done with it ; that, over a month before the execution of the will, he had so disposed of his moneys in the savings bank that the Perrines would receive it after his death ; that he gave to Mr. Van Buren the necessary

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instructions for drawing the will before the execution of it, and that they were alone at the time, and that he finally executed it in the manner described by the subscribing witnesses. This evidence, considered with the testimony of Dr. Shafer, that, at the time of the execution of the will, he was mentally sound and not under any restraint, makes a strong affirmative case for the proponents. The suspicious facts and circumstances shown by the contestants are not sufficiently strong to overcome this positive testimony, and the proponents are therefore entitled to have the will admitted to probate.

Decreed accordingly.



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ABSENCE.

See MARRIAGE, 4.

ACCOUNTING.

1. Time devoted by executors' counsel to examining the law, and drawing and settling the decree, on an accounting which is not contested, is not occupied in "preparing for the trial" within the meaning of Code Civ. Pro., § 2562. *Matter of Miles*, 110.
2. The allowance of \$25, to executors, etc., under Code Civ. Pro., § 2561, is designed to cover all the proceedings on an accounting where no trial is had, except the preparation of the account; unless, *it seems*, where, objections having been filed, and reasonable preparation made, the objections are withdrawn before trial. *Id.*
3. The question, what is a judicial settlement of the account of an executor, etc., under that Code,—discussed. *Id.*
4. Certain items, each under \$20, not accompanied by proper vouchers or proof, allowed in executors' account, because not exceeding, in the aggregate, \$500. *Smith v. Bisby*, 196.
5. A party objecting to an account must sustain his objections by proof, before they can be allowed. *Carroll v. Hughes*, 337.
6. Charges for legal services, rendered to an administrator, etc., upon an accounting, must be separately stated, and accompanied with an affidavit showing conformity to Code Civ. Pro., § 2562. *Id.*
7. Exceptions to a referee's report, on an accounting, to answer any useful purpose, must specifically point out the errors complained of, where the latter do not appear from a mere denial of the correctness of the finding. *Ingrem v. Mackey*, 357.
8. An application, under Code Civ. Pro., § 2606, to compel the representative of a deceased co-representative to account and deliver over property, is not terminated by a verified denial that property has come into the possession or is under the control of such representative. The applicant has a right to examine the respondent under section 2735. *Wood v. Crooks*, 381.
9. Section 2718 of that Code, providing for a dismissal of the petition by

the Surrogate, upon the filing of a verified answer, raising a doubt as to the validity of petitioner's claim, refers exclusively to proceedings taken under § 2717, and has no application to those taken under § 2606. *Id.*

10. Upon an application by a legatee, under Code Civ. Pro., § 2606, to compel the representative of a deceased executor to account for and deliver over trust property, and pay the legacy, the respondent filed a verified answer denying the receipt of any such property, which answer was not controverted. *Held*, that this terminated the proceeding, the petitioner having no right to insist on continuing, in order to prove the amount due her, as a basis for an action on the deceased executor's official bond. *Peck v. Sherwood*, 416.
11. Under Code Civ. Pro., § 2606, the representative of a deceased executor, etc., may be compelled to render successive accounts to each of the persons therein mentioned as having a right to demand an account, etc. *Spencer v. Popham*, 425.
12. *It seems*, that the rule is otherwise with respect to an accounting required, under section 2605, of a representative whose letters have been revoked, for, in that case, he may apply for a judicial settlement of his account under section 2733. *Id.*
13. A legatee who institutes proceedings under section 2606, wherein a decree is rendered directing the delivery of trust property, is not entitled to a direction for the delivery thereof to himself, but only to a successor in office, or "such other person as is authorized by law" (§ 2603) to receive it, in order to properly administer the same; the object of the section being to enable any one interested to compel the placing of the funds in official custody. *Id.*
14. One entitled to a remainder after a life estate given by will is a "person interested in the estate," within the meaning of Code Civ. Pro., § 2726, permitting such a person to apply to compel an executor to settle his account. *Campbell v. Purdy*, 434.
15. The creditors of a distributee are not proper parties to an accounting of the administrator before the Surrogate, and cannot contest the validity of the assignment of such distributee's share. *Duncan v. Guest*, 440.
16. G., as next of kin of the intestate, was entitled to a distributive share of the estate, which he assigned to his wife. His creditors attached, in the hands of the administrator, the share so assigned, claiming that the assignment was fraudulent and void. Upon the accounting of the administrator, the creditors sought to intervene and to prevent the payment of the share to the wife until the validity of the assignment to her could be settled. *Held*, that the creditors had no standing in the Surrogate's court, and that the share must be paid to the wife as assignee. *Id.*
17. Under Code Civ. Pro., § 2735, authorizing the Surrogate to require an accounting executor or administrator "to attend and be examined under oath," that officer has power, in his discretion, to direct such an

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examination, upon application therefor, whether formal objections to the account have been filed or not. *Geer v. Ransom*, 578.

See COSTS, 2; DISCOVERY AND INSPECTION, 1; EXECUTORS AND ADMINISTRATORS, 3; GUARDIAN AND WARD, 7; TESTAMENTARY TRUSTEE, 16.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

ADMINISTRATOR WITH WILL ANNEXED.

1. Although Code Civ. Pro., §§ 2645, 2667, literally requires an administrator with the will annexed to give a bond in a penalty "not less than twice the value of the personal property of which the decedent died possessed," etc., yet, where he is also an administrator *de bonis non*, those provisions are to be construed as fixing the minimum penalty of his bond at the value of the property left unadministered. *Sutton v. Weeks*, 353.
2. Where no assets had come to the hands of an administrator with the will annexed, but it appeared that he had commenced an action in the supreme court, for claims due to the estate, and that the penalty of his bond was sufficiently great to secure the probable recovery therein—on an application by a party to the action to compel additional security, *Held*, that the powers of the supreme court were ample to protect all parties in case of the recovery of a greater amount, and that the administrator might, if necessary, be required to give increased security before receiving the money. *Id.*

See TESTAMENTARY TRUSTEE, 15.

ADVANCES.

See GUARDIAN AND WARD, 7.

ALIENATION.

See ACCOUNTING, 16; SUSPENSION OF OWNERSHIP.

ALTERATION OF WILL.

See EXECUTION OF WILL, 11, 12.

AMENDMENT.

See INVENTORY, 2, 3; VARIANCE.

ANCILLARY LETTERS.

1. The will of a citizen of the United States, residing in China, admitted to probate by the court of the United States consulate-general at Shanghai, may be presumed to have been executed according to the laws of China; and on the production, to a Surrogate's court here, of

- an exemplified copy of the record thereof, under the seal of such consulate, letters could be issued thereon, under 2 R. S., 67, § 68 (revised in Code Civ. Pro., § 2695). *Matter of Taintor*, 79.
2. Where an application is made, pursuant to Code Civ. Pro., § 2395, for ancillary letters under a will proved in a court of another State, by whose laws wills are admitted by the oral direction of the court, without any written "judgment, decree or order,"—that fact should appear by the certificates of exemplification, or, if such a certificate is refused, then by the affidavit of a person having knowledge of those laws. *Matter of Hudson*, 333.
 3. *It seems*, that a will proved before the Surrogate of a county of the State of New Jersey—it appearing, by the certificate of the Secretary of that State, that such Surrogate has jurisdiction, and that he is the clerk of the orphans' court of his county, which is a court "duly constituted," etc. (Code Civ. Pro., § 2705), may, by a liberal construction, be deemed to have "been admitted to probate by a competent court," within the meaning of Code Civ. Pro., § 2695; the authorized and authenticated act of the clerk, an officer and component part of his court, being considered as performed by the latter. *Id.*

See LETTERS OF ADMINISTRATION; LETTERS TESTAMENTARY.

ANNUITY.

1. The testator was divorced from his wife in 1857, for adultery with N., and forbidden to remarry. From 1857, until his death in 1879, he cohabited with N. as his wife, without a marriage. By his will he gave to his "beloved wife," N., all his household furniture, plate, etc., and a life annuity of \$1,000, adding "the above provisions in favor of my wife to be in lieu of dower." Payment of the annuity "in lieu of dower," was opposed by those interested in the residuary estate, on the ground that it was void. *Held*, 1. That the misdescription of the legatee as testator's wife did not avoid the legacy, as there was no ambiguity in respect to the person intended, and no fraud was practiced on the testator. 2. That the expressed consideration, "in lieu of dower," though untrue and impossible, did not avoid the legacy, since no consideration was necessary to its validity. *Klein v. Hayek*, 210.
2. The testator, by his will, gave to his wife an annuity of "fifteen hundred dollars, United States currency, the United States currency to be calculated at the rate of one hundred and ten dollars currency for every one hundred dollars United States gold, if, at the time when the above payments commence, specie payments should have been resumed, and also if gold should have gone higher." Specie payments were resumed before payment of the annuity commenced. The executor having paid to the widow \$1,610 per annum, on his accounting the next of kin objected that the payment should have been \$1,500 per annum. *Held*, 1. That the intent of the testator was that, if currency remained below par and above a point at which gold was estimated at 110, the widow should receive \$1,500 in currency, per annum, but that, if cur-

rency rose to par or depreciated below the point at which gold was estimated at 110, she should receive the equivalent of \$1,863.64 in gold. 2. That, specie payments having been resumed, the annual payment should have been the last-named sum, and that the excess paid by the executor should be charged to him, with interest; and he be allowed to deduct the same from future payments of the annuity. *Schutz v. Stutzer*, 344.

9. Where an annuity given by will is derived from the bequest of a fixed sum, the beneficiary may assign his interest—the provisions of 1 R. S., 730, §§ 63, 65, relating to the alienation of trust interests, even if held to include trusts of personalty, not applying to such a case. *Cocks v. Barlow*, 406.

See LEGACY.

APPOINTMENT OF EXECUTOR.

See EXECUTORS AND ADMINISTRATORS, 6, 22–25; WILL, 11.

APPOINTMENT, POWER OF.

See LEGACY, 9, 10.

ASSETS.

The intestate, at the time of her death, possessed, besides other property, certain moneys deposited in savings banks in her own name, individually, and in trust for her several children. Upon an application by one of the children to compel her father, the administrator, to account for these moneys, the evidence showed that they were derived exclusively from his earnings, and that he had delivered them to the intestate, as his agent, to deposit the same in trust; that he had withdrawn the moneys from bank through the instrumentality of his letters, making an entry, in an account-book, of the receipt thereof, as of a portion of the effects of the intestate, and had re-deposited a portion in his own name, as trustee for certain of the children, but subsequently withdrew the amounts and claimed to have expended the moneys for the support and maintenance of the children. *Held*, 1. That the husband, by the mere delivery of these moneys to his wife, did not divest himself of his title thereto, and that he was not estopped from claiming title by the entry in his account-book, nor by procuring the moneys through the instrumentality of his letters. 2. That, upon the petitioner's own theory, the moneys claimed by the children did not constitute assets of the intestate's estate, for which the administrator, as such, could be called to account in the Surrogate's court, but that their remedy was an action against the husband, for conversion. *Crowe v. Brady*, 1.

See ADMINISTRATOR WITH WILL ANNEXED, 2; EXECUTORS AND ADMINISTRATORS, 2; FUNERAL EXPENSES, 1; INVENTORY.

ASSIGNMENT.

See ACCOUNTING, 16; ANNUITY, 8; LEGACY, 10, 12, 13.

ATTACHMENT.

See CONTEMPT.

ATTESTATION CLAUSE.

See EXECUTION OF WILL, 1, 19.

BEQUEST.

See ANNUITY; CHARITABLE BEQUESTS; LEGACY; WILL.

BILLS AND NOTES.

See INDORSER.

BOND.

See MORTGAGE; OFFICIAL BOND.

BOND, OFFICIAL.

See ADMINISTRATOR WITH WILL ANNEXED, 1, 2.

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See EXECUTORS AND ADMINISTRATORS, 17.

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See DISCOVERY AND INSPECTION.

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See PROBATE OF WILL; TESTAMENTARY CAPACITY; UNDUE INFLUENCE.

BURIAL PLOT.

See FUNERAL EXPENSES, 2.

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 Conboy v. Jennings, 1 T. & C., 622, distinguished. *Dennett v. Taylor*, 561.

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 Heady's Will, 15 Abb. N. S., 211, distinguished. *Brady v. McCrosson*, 431.
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 Van Schuyver v. Mulford, 59 N. Y., 426, distinguished. *Richards v. Moore*, 278.
 Williams v. Thorn, 70 N. Y., 270, distinguished. *Cocks v. Barlow*, 406.
 Wood v. Byington, 2 Barb. Ch., 387, followed. *Kavanagh v. Wilson*, 43.

CESTUI QUE TRUST.

1. Where a trustee claims a confirmation, by the *cestui que trust*, of the former's unlawful acts, in dealing with the estate, the rule is that the party confirming must not labor under any disability, must act deliberately, upon full information, without false suggestion or reservation on the part of the trustee, and must be aware of the law that he might impeach the transaction in a court of equity. *Luers v. Brunjes*, 32.
2. One named as *cestui que trust* in a will may take, under its provisions, in trust for himself and others. *Cocks v. Barlow*, 406.
3. A *cestui que trust* may, by executing a formal release, discharge all or any of several trustees from liability for a breach of the trust. *Id.*

CHARITABLE BEQUESTS.

See LEGACY, 15.

CODE OF CIVIL PROCEDURE.

[Sections construed or cited.]

- § 17. *McCue v. O'Hara*, 386.
- §§ 803-809. *Dale v. Stokes*, 586.
- § 829. *Burnett v. Noble*, 69.
- § 829. *Matter of Burke*, 369.
- § 835. *Pearsall v. Elmer*, 181.
- § 1865. *McNally v. Brown*, 372.
- § 1865. *Early v. Early*, 376.
- § 2472, subd. 3. *Thompson v. Mott*, 574.
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- § 2474. *Heilman v. Jones*, 398.
- § 2475. *Heilman v. Jones*, 398.
- § 2476. *Oviedo v. Duffle*, 187.
- § 2481, subd. 5. *Dale v. Stokes*, 586.
- § 2481, subd. 6. *Heilman v. Jones*, 398.
- § 2481, subd. 6. *Becker v. Bochus*, 488.
- § 2481, subd. 11. *Tompkins v. Moseman*, 402.
- § 2514, subd. 6. *Matter of Clark*, 466.
- § 2514, subd. 6. *Matter of Roosevelt*, 601.
- § 2514, subd. 8. *Matter of Miles*, 110.
- § 2514, subd. 9. *Matter of Miles*, 110.
- § 2530. *Matter of Ludlow*, 391.
- § 2531. *Matter of Ludlow*, 391.
- § 2538. *Dale v. Stokes*, 586.
- § 2555. *Woodhouse v. Woodhouse*, 181.
- § 2555. *Joel v. Ritterman*, 186.
- § 2557. *Chalker v. Chalker*, 480.
- § 2558. *Matter of Miles*, 110.
- § 2558. *McCue v. O'Hara*, 386.
- § 2561. *Matter of Miles*, 110.
- § 2562. *Matter of Miles*, 110.
- § 2562. *Harvard v. Hewlett*, 330.
- § 2562. *Carroll v. Hughes*, 387.
- § 2608. *Peck v. Sherwood*, 416.
- § 2608. *Spencer v. Popham*, 425.
- § 2606. *Spencer v. Popham*, 425.
- § 2606. *Wood v. Crooke*, 381.
- § 2606. *Peck v. Sherwood*, 416.
- § 2606. *Spencer v. Popham*, 425.
- § 2617. *Lafferty v. Lafferty*, 326.
- § 2621. *McNally v. Brown*, 372.
- § 2637. *Martin v. Duke*, 597.
- § 2639. *Martin v. Duke*, 597.
- § 2645. *Sutton v. Weeks*, 353.
- § 2647. *Heilman v. Jones*, 398.

- § 2648. *Becker v. Boehus*, 488.
- § 2661. *Matter of Demmert*, 299. •
- § 2667. *Sutton v. Weeks*, 353.
- § 2688. *Matter of Roosevelt*, 601.
- § 2695. *Matter of Taintor*, 79.
- § 2695. *Matter of Hudson*, 338. •
- § 2696. *Weed v. Waterbury*, 114.
- § 2705. *Matter of Hudson*, 338.
- § 2715. *Greenhough v. Greenhough*, 191.
- § 2716. *Greenhough v. Greenhough*, 191.
- § 2717. *Wood v. Crooke*, 881.
- § 2718. *Steinels v. Oechler*, 312.
- § 2718. *Wood v. Crooke*, 881.
- § 2719. *Tuttle v. Heidermann*, 199.
- § 2723. *Matter of Miles*, 110.
- § 2724. *Matter of Miles*, 110.
- § 2726. *Campbell v. Purdy*, 434.
- § 2728. *Campbell v. Purdy*, 434.
- § 2732. *Spencer v. Popham*, 425.
- § 2735. *Wood v. Crooke*, 881.
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- § 2736. *Meeker v. Crawford*, 450.
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- § 2737. *Secor v. Sentis*, 570.
- § 2737. *Matter of Roosevelt*, 601.
- § 2743. *Duncan v. Guest*, 440.
- § 2745. *Duncan v. Guest*, 440.
- § 2750. *U. S. Life Ins. Co. v. Jordan*, 207.
- § 2811. *Meeker v. Crawford*, 450.
- § 2811. *Matter of Roosevelt*, 601.
- § 2817. *Matter of Roosevelt*, 601.
- § 2818. *Tompkins v. Moseman*, 403.
- § 2818. *Matter of Clark*, 436.
- § 2819. *Matter of Roosevelt*, 601.
- § 2821. *Matter of Barré*, 64.
- § 2832. *Bolling v. Coughlin*, 116.
- § 2852. *Geoghegan v. Foley*, 501.
- § 3347, subd. 11. *Woodhouse v. Woodhouse*, 131.
- § 3347, subd. 11. *Joel v. Ritterman*, 136.
- § 3347, subd. 11. *Lafferty v. Lafferty*, 326.
- § 3349. *Geoghegan v. Foley*, 501.
- § 3352. *U. S. Life Ins. Co. v. Jordan*, 207.
- Ch. 4. *U. S. Life Ins. Co. v. Jordan*, 207.

CODICIL.

See DELUSION, 4; LEGACY; WILL.

COMMISSIONS.

See EXECUTORS AND ADMINISTRATORS, 4, 11, 18-21; TESTAMENTARY TRUSTEE, 3, 4, 9-14, 16-22.

CONDITION.

See EVIDENCE, 7; LEGACY, 1, 12, 13.

CONTEMPT.

1. Before the Code of Civil Procedure, the only mode of enforcing a Surrogate's decree for the payment of money was an attachment against the person, in form similar to that used by the court of chancery in analogous cases. *Woodhouse v. Woodhouse*, 131.
2. Section 2555 of that Code, providing for the enforcement of such a decree by punishment for a contempt, applies only where the special proceeding, terminating in the decree, was commenced before September 1, 1880. *Id.*
3. Where the moving papers, on an application to punish for a contempt under that section, do not show previous service of a certified copy of the decree on the alleged delinquent, the motion should be denied. *Id.*
4. A decree was obtained February 26, 1880, against an executor, on final settlement of his account, directing him to pay a sum of money to a legatee. Upon an application for an attachment against him, for non payment, he set up, as reason for failure to pay, his insolvency and the want of means or property, of his own or belonging to the estate, with which to pay any portion. *Held*, no defense. *Joe v. Bitterman*, 186.

CONTINGENCY.

See LEGACY, 12, 13.

COSTS.

1. Costs may, by analogy to the practice of the supreme court in equity, be allowed under the Code of Civil Procedure, to each of the parties adjudged to be entitled, in the discretion of the Surrogate. *Matter of Miles*, 110.
2. The costs of an accounting by an executor, etc., have no place in the account filed in that proceeding, as they must first be fixed by the decree. Charges for counsel fees, paid on the accounting, should be separately stated, and accompanied with an affidavit showing conformity to Code Civ. Pro., § 2562. *Harward v. Hewlett*, 330.
3. An attorney who is executor cannot be allowed any costs in actions relating to the estate; otherwise as to disbursements and expenses. *Campbell v. Purdy*, 434.
4. Under Code Civ. Pro., § 2557, prohibiting the allowance of costs by the Surrogate, other than expenses, out of an estate or fund less than

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\$1,000 in amount or value, the amount of an estate is not the balance left after payment of funeral expenses, debts and expenses of administration, but the gross amount thereof, at the time of the owner's death, with any increase up to the time of accounting. *Chalker v. Chalker*, 480.

See ACCOUNTING, 2; SALE OF REAL ESTATE, 3, 4.

COUNSEL FEES.

See ACCOUNTING, 6; COSTS, 2.

CREDITOR.

See ACCOUNTING, 15, 16.

DEATH.

See MARRIAGE, 3; PROBATE OF WILL, 7.

DEBT.

See DISPUTED CLAIM; PREFERRED CLAIM; SALE OF REAL ESTATE.

DECREE.

See CONTEMPT.

DELUSION.

1. An insane delusion is one which not only is founded in error, but is without evidence of its truth, and often exists against the clearest evidence to the contrary. Its essence is that it has no basis in reason, and cannot be dispelled thereby. *Merrill v. Rolston*, 220.
2. The decedent and her husband, in 1838, informally adopted G., the former's nephew, with the intention of leaving him their property, educated him at Trinity College, Dublin, and traveled with him in Europe. G., at their request, took their name, and always afterwards bore it. The husband, who always manifested great affection for G., died in 1867, leaving a will made in 1856, which gave to G. \$80,000, and all his property, in case the former survived decedent. The latter made a will in 1856, giving all to her husband if he survived her, otherwise to G. In 1854, G. engaged in business in New Jersey, and, during some years thereafter, living apart from his adopted parents, received numerous letters, from time to time, from decedent, the general tenor of which was one of deep interest, admiration and affection, she addressing him as her dear son, etc., and signing as his affectionate mother. In 1862, G. married an estimable lady, against decedent's will, his engagement having already led to an estrangement from, and his rejection by, decedent. In numerous letters, thereafter, and down to the close of her life, though the character and conduct of G. re-

mained, in all respects, exemplary, decedent repeatedly expressed her dislike, distrust and hatred of him; refused him her name, suggesting that if he had married one of certain persons specified, his name would have been hers; mutilated her will of 1856 and his portrait, cutting from the latter the mouth and thumb, as evidence of her displeasure; addressed to him violent and senseless imprecations, and indulged in vulgar and baseless charges against the character of himself and wife. There was also evidence of strange and eccentric conduct on decedent's part, in other respects. In 1871, she executed the paper propounded as her will, in which she ignored G., and gave the bulk of her fortune to charities, and to clergymen of the Roman Catholic Church, of which church she had become a member since 1856. In 1875, she executed the paper propounded as a codicil, reciting the death of Bishop Bacon, a legatec, and substituting Cardinal McCloskey. Two prominent ecclesiastics of said church aided in the preparation of the codicil, and signed the same as witnesses, but took no benefit thereunder. Contestants put in issue decedent's mental capacity, and freedom from restraint. *Held*, 1. That the facts relating to the execution of the codicil did not justify any presumption or suspicion of undue influence. 2. That, upon the whole evidence, no reasonable doubt arose of the general capacity of decedent, and the unrestrained execution of the will and codicil; and that the same must be adjudged valid, unless vitiated by an insane delusion respecting G. 3. That decedent's said adopted son had an interest which entitled him to contest the probate of the instruments propounded, and that they should be refused probate, because executed by her while laboring under an insane delusion concerning him—the same being the direct offspring of such delusion. *Merrill v. Rolston*, 220.

3. Where a will is made in a sound state of mind, and is subsequently revoked without the slightest evidence of any change of purpose, or any ground for it, after the testator has shown signs of breaking up mentally, the revocation may be attributed to delusion. *Miller v. White*, 320.
4. The testatrix, in 1877, made a will, giving to her niece, who was her only next of kin, and of whom she had always been fond, certain legacies and an annuity of \$1,000. In 1878, signs of mental disturbance began to be noticeable in testatrix, including a great change for the worse in her personal habits, conduct and feelings, she becoming untidy, morose, unsocialable, and subject to delusions, in particular taking a great and causeless dislike to her niece, suspecting the latter's motives in visiting her, declaring that she hated her, and even accusing her of pilfering. In March of that year, after the appearance of these symptoms, testatrix executed a codicil for the sole purpose of revoking all the provisions in her will, made in behalf of her niece. Experts and one of the subscribing witnesses testified to an impairment of testatrix's faculties, occurring after the will was executed. *Held*, that, although the mental deterioration testified to might not have deprived

testatrix of the moderate degree of capacity necessary to enable her to make a testamentary disposition, the codicil must be refused probate, as being the direct offspring of an insane delusion on her part, in respect to her niece. *Id.*

See TESTAMENTARY CAPACITY.

DESTROYED WILL.

See LETTERS OF ADMINISTRATION, 8; WILL, 3-8.

DEVASTAVIT.

See EXECUTORS AND ADMINISTRATORS, 7-10, 16; LEGACY, 7; TESTAMENTARY TRUSTEE, 7, 8; WILL, 10.

DEVISE.

See LEGACY; WILL.

DISCOVERY AND INSPECTION.

1. A son of testatrix, who had objected to the account filed by her executor, petitioned for an order directing the latter to deliver certain letters and other papers in his possession, and which testatrix had at the time of her death; not claiming that the articles had any literary value, or were in any sense assets, but alleging that some of them related to the accounting, and were necessary for petitioner's use in that proceeding. *Held*, that such an order was unauthorized by statute, no authority to grant it being contained in the provisions of Code Civ. Pro., § 2472, which confers power upon the Surrogate's court to direct and control the conduct of executors, to enforce the distribution of the estates of decedents, and the payment or delivery, by executors, of money or other property in their possession, belonging to the estate—such jurisdiction to be exercised *in the cases and manner prescribed by statute*. *Thompson v. Mott*, 574.
2. The petitioner, who was contesting the probate of a paper propounded as the will of decedent, her father, applied for an order directing the temporary administrator, her brother, who was also proponent, to produce and deposit in court, subject to examination by herself and her counsel, certain books and papers of the decedent, alleging, on information and belief, that the latter kept books of account and preserved letters, documents, and papers relating to the estate, of interest to him and his children; that he was, latterly, somewhat under the influence of his sons, including the respondent, one or more of whom kept said books; that the books and papers referred to were in the possession of respondent, who was unfriendly to her and permitted her opponents to examine the same for evidence in support of the will, while she was unable to obtain any such information; that she desired to ascertain,

from an inspection, how far the books, etc., contained evidence material to the pending controversy, and also to satisfy herself as to the condition of the estate; that she could not specify, with more particularity, the documents referred to, because she had never seen any of them. It appeared that the only attempt which petitioner had made to obtain the desired inspection, was a letter from her counsel to the counsel of the administrator, asking when and where she could examine "the books and papers of the late James Stokes, his books of account and other papers," to which it was replied that the extent to which documents of the estate should be furnished for examination was in the discretion of the Surrogate. The application was urged, not on the strength of any express statutory provision or decided case, but on the ground that both parties should enjoy the same privileges, and that the control of the court over the temporary administrator was broad enough to justify the order asked. *Held*, 1. That the powers of the Surrogate in the premises were exclusively such as were derived from statute. 2. That his *general* control of executors and administrators, so far as concerned the matter in discussion, depended upon Code Civ. Pro., §§ 2472, 2481, neither of which sections justified the granting of the relief asked. 3. That, so far as the proceeding was, substantially, one for discovery and inspection, it must be governed by Code Civ. Pro., §§ 803-809, and § 2538; under which sections and the decisions the petition was faulty for want of particularity, and in not stating facts showing the necessity of the inspection, etc. 4. That the letter of the administrator's counsel was not to be deemed a refusal to permit a proper inspection, in view of the sweeping character of the petitioner's demand. 5. That to grant orders of the character asked, under the circumstances presented, would be to interfere with the orderly administration of estates, and foster unnecessary and profitless litigation; and that the application should be denied. *Dale v. Stokes*, 586.

DISMISSAL.

See ACCOUNTING, 9, 10; LEGACY, 4, 5.

DISPUTED CLAIM.

See EXECUTORS AND ADMINISTRATORS, 1; LIMITATIONS, STATUTE OF, 2, 3; PREFERRED CLAIM.

DISTRIBUTE.

See ACCOUNTING, 15, 16; LEGACY, 3.

DOMICIL.

1. A citizen and resident of this State could not establish a domicile in France, under the empire, without an authorization of the emperor, under chap. 1, § 18, of the Code Napoleon. *Tucker v. Field*, 139.

2. The recital, in a will, that the testator, at the time of execution, is residing at a place named, is not controlling, the term residence being commonly employed in the sense of sojourn. *Id.*
3. The fact that a will, executed in a foreign country by one whose domicile of origin is in this State, is executed with the formalities prescribed by the laws of this State, raises a presumption in favor of an intent to retain such domicile. *Id.*
4. A party alleging a change of domicile from that of origin holds the burden of proof. *Id.*

See EXECUTORS AND ADMINISTRATORS, 18, 15; UNDUE INFLUENCE, 2.

DOWER.

See ANNUITY, 1.

ESTOPPEL.

1. An entry by an administrator in his account-book, under the head of an inventory of the effects of the estate, of money deposited in bank by the intestate, and withdrawn by him, under authority of his letters, does not prevent him from claiming the money as his own; nor is he concluded by a declaration of the intestate, made in her life-time, in his absence, inconsistent with his title. *Croves v. Brady*, 1.
2. The decedent, who, at the time of his death in 1865, was a member of a firm, left a will, disposing of his property for the benefit of his widow, son and daughters, and directing his executors to cause the value of his interest in the firm to be ascertained, and to transfer the same to said firm, upon their executing an obligation to pay the amount, when his son should attain majority, which occurred in 1870. The executors, being members of the firm, allowed the funds of the testator to remain in the business, drawing interest, but omitted to take the obligation as required. In 1875 and 1876, the membership of the firm having changed, and the business having deteriorated, said executors took, from members of the firm, a bond and mortgages upon the firm lands, which were already incumbered, to secure the balance due to the estate. Subsequently their letters were revoked on their application, and administration with the will annexed was granted to the son and daughters, the securities being transferred to the administrators. It appeared that the beneficiaries were unaccustomed to business—the mother being only partly acquainted with the English language—and that they had no sufficient notice, at the time, of the breach of trust on the part of the executors, the securities being taken after the estate had become manifestly imperiled. *Held*, 1. That the executors had no right to speculate upon the result of a plain neglect of their duty, and were liable for the loss growing out of such neglect. 2. That the beneficiaries, under the circumstances, were not estopped from holding the trustees liable, by the receipt of income, nor by the ultimate acceptance of the custody of the estate, and the transfer of the securities. The

essence of an estoppel is that a person has done or omitted to do something, which has induced a line of conduct by another, the denial of which thereafter would injure the rights of the one acting upon the representations or silence of him who seeks to enforce the liability against him. *Luers v. Brunjes*, 32.

See ASSETS.

EVIDENCE.

1. In proceedings against an administrator, to compel him to account, his testimony concerning transactions and conversations with the intestate, called out by the moving party, cannot be stricken out or disregarded upon the latter's motion, though otherwise if it had been offered by the administrator, and objected to at the time. *Crowe v. Brady*, 1.
2. The same proof is necessary for the establishment of an executor's claim, in proceedings to sell real estate of the decedent, as in a proceeding specially instituted for such proof, or on a final accounting; and an order validating the claim, made in the first named proceeding, is binding and conclusive upon the estate in either of the others. *Matter of Gardner*, 14.
3. Conversations and dates, given from memory, are a kind of testimony which is apt to be unreliable, the conversations being often very imperfectly remembered, and the modes of expression misunderstood in their significance; and should not, alone, be regarded as controlling. *Sarvent v. Hesdra*, 47.
4. The testimony of an executor, with reference to transactions and communications with decedent, and what he did, as tending to show an implied agreement to pay for his services, is incompetent under Code Civ. Pro., § 829. *Burnett v. Noble*, 69.
5. The purpose of that section is to prevent the establishment of claims against estates by the testimony of persons interested in the establishment, when the mouth of the alleged obligor is sealed in death. *Id.*
6. In the absence of proof to the contrary, the laws of a sister State are presumed to be the same as our own. *Carroll v. Hughes*, 337.
7. One named as legatee in a will, on condition that he render certain services of a religious character, is, under Code Civ. Pro., § 829, disqualified by his interest in the event, from testifying to conversations had between him and the testator. *Matter of Bufke*, 369.
8. The court has a discretion to strike out, on motion made during a hearing, testimony incompetent under that section, though not objected to when offered. *Id.*

See ANCILLARY LETTERS, 1, 2, 3; HAND-WRITING; PRIVILEGED COMMUNICATION; SALE OF REAL ESTATE, 1, 2; WITNESS.

EXAMINATION OF PARTY.

See ACCOUNTING, 8, 17.

EXCEPTIONS.

See ACCOUNTING, 7.

EXECUTION OF WILL.

1. The intervention of a blank page between disposing parts of a will, though a careless method, does not necessarily invalidate the instrument, especially where the blank divides a continuous sentence. Nor does the fact that the attestation clause is appended by means of a sheet pasted at the end of the will. *Matter of Collins*, 20.
2. The instrument propounded was drawn on a sheet of legal cap, commencing on and covering the first page, which ended in the body of a sentence, passing over the second page, which was blank, the unfinished sentence continuing, and the instrument being concluded, and subscribed by the testator on the third page, which was marked "2d," and to which was pasted a supplementary sheet containing the attestation clause, and the subscribing witnesses' signatures, *Held*, a sufficient execution. *Id.*
3. The instrument propounded as decedent's will was an irregular piece of coarse brown paper, measuring ten by seven inches, written partly with a blue, and partly with a black pencil. Upon the first page was a disposing clause, followed, at the foot, by the names of two witnesses. The paper appeared then to have been folded sidewise, thus forming a second page, upon which were written, in the order given, the names of the same two witnesses, another disposing clause, the decedent's signature, a statement of a reason for the dispositions, and the decedent's signature, again. The names of the witnesses could not be made to appear as subscribed at the end of the will, by any system of folding. *Held*, that the instrument should be refused probate, on inspection, on the ground that the attesting witnesses did not sign their names at the end thereof. *Hewitt v. Hewitt*, 271.
4. Where a fatal defect is patent upon the face of a paper, offered for probate as a last will, it may be rejected without entering upon formal proof. *Id.*
5. The words "at the end of the will," in 2 R. S., 68, § 40, subd. 4, relating to the signatures of attesting witnesses to a will, refer to place, and not to time. *Id.*
6. The requirement of the statute, that the witnesses shall sign, *at the end of the will*, is as obligatory as the corresponding provision relating to subscription by the testator. *Id.*
7. The doctrine that one requirement may be so complied with, as to include compliance with another, has no application to such a case. *Id.*
8. It is not necessary that a subscribing witness to a will should actually see the testator sign; it is enough (in the absence of an acknowledgment), if his signature was affixed in the presence of the witness; and a constructive presence, as being in an adjoining room, the door to which

was open, may be deemed a compliance with the statute. *Spaulding v. Gibbons*, 318.

9. Upon an application for the probate of a will, to which there was no attestation clause, the testimony of the subscribing and other witnesses showed that the necessary formalities were complied with, except that there was a question whether the testator signed in the presence of one of the subscribing witnesses. There was no claim that the testator acknowledged his subscription. It appeared that the execution took place while testator was in bed, in a small room; that the will was read to him, and he said it was what he wanted, and declared that he had his full senses and understanding; that he asked one witness to sign, while the other witness was requested so to do by a third person in testator's presence. The former witness testified that testator signed in the presence of both witnesses, before they affixed their signatures, and declared the paper to be his last will. The latter witness did not remember whether he saw testator sign or not, but the evidence showed that he was, at the time, either in the same room or in an adjoining room, in such a position that he could see the signing after his attention was drawn to what was going on. The whole transaction occupied about five minutes. *Held*, that, upon the evidence, the testator must be considered to have signed in the presence of each subscribing witness, and that the proper execution of the will was proved. *Id.*
10. After the instrument propounded as decedent's will, being a single page of foolscap, containing no appointment of executor, had been read to and approved by decedent, and signed and witnessed at the end, with due formalities, a clause was added at the top of the second page, in the witnesses' presence, and signed by decedent but not by the witnesses, appointing his wife executrix. *Held*, that the first page was decedent's will, and the same should be admitted to probate. *Brady v. McCrosson*, 431.
11. Unattested and unexplained alterations, appearing upon the face of a will, are presumed to have been made after execution. *It seems*, that the same rule prevails in this State—differing from the English doctrine—in respect to material changes in a deed. *Wetmore v. Carryl*, 544.
12. The testator, by his will, gave a pecuniary legacy to each of two granddaughters, E. and A., the amount of which, as originally written, was \$5,000, but had been changed by erasures, and by marks in ink of a different color from that of the body of the will, to \$2,000. The will occupied only a single page of a printed form, at the center of which was a circular blot, three-eighths of an inch in diameter, apparently of the same ink as the alterations. The attention of neither of the subscribing witnesses was called to any alteration, by the testator; neither of them observed any defacement, erasure or other alteration, at the time of the execution; and there was no memorandum to the effect that the changes were made before signature. No direct evidence was given of the execution of the instrument in its altered state. C., one

of the executors, testator's son-in law, testified that, in a conversation with testator, some time in 1890, the latter spoke of having seen his lawyer, F., with reference to drawing up a new will, and stated that F. had suggested \$5,000, as the amount of a legacy to each of the granddaughters, to which testator had assented; that witness suggested one-twentieth of the estate as a suitable amount to each of them, to which testator assented; that, the next day, testator said, "I have arranged that in a different way; I have made it \$2,000." But the date of these conversations was not fixed relatively to the time of the execution, or even of the drawing of the will; and witness did not understand that they indicated more than a change of purpose. Testator had been a man of proved business capacity, exhibiting skill and precision in the management of affairs, but died aged eighty-four years. The will had been admitted to probate in 1881, and recorded as altered. On an application to change the record, by substituting the original for the altered form, *Held*, that to say that testator's declared purpose took shape in the alterations in question, before execution of his will, would be to hazard a guess rather than to draw an inference; that, upon the evidence, the alterations must be deemed to have been made after such execution; and that the application should be granted. *Id.*

13. The subscription of a testator, and the signatures of the attesting witnesses, must be "at the end of the will." *Dennett v. Taylor*, 561.
14. Partial probate cannot be granted, where several writings are propounded as a will, unless the matter rejected appears to have formed no part of the testamentary purpose. *Id.*
15. In order to incorporate a paper into a will, by reference, the testator must distinctly describe it, and it must be then in existence. *Id.*
16. The paper propounded as decedent's will covered the first and second pages of a sheet of paper, the former of which, being partly printed and partly in decedent's handwriting, contained the introduction, a direction to pay debts, an appointment of executors, one dispositive clause followed by a blank of four inches, the in testimonium and attestation, and the signatures of decedent and witnesses. The dispositive clause bequeathed certain amounts "as hereinafter named," without further explanation. On the second page were twenty lines in decedent's handwriting, giving certain legacies to persons and for purposes specified, and disposing of "all the balance" of his assets for the benefit of his ward, without signature. At the time of execution, the subscribing witnesses did not see the writing on the second page, except as indistinctly appearing through the sheet, upon the first page; and there was no evidence that such writing had then taken its latest form, nor that decedent, in the words, "hereinafter named," had reference thereto, nor that the property sought to be bequeathed on the second page was or was not the same as that mentioned on the first. On application for probate, *Held*, 1. That the two pages could not be admitted as a will, the testator and witnesses not having signed "at the end" thereof; and the theory of an incorporation of the second into the

- first page, by reference, being untenable because, in order to such a result, the testator must distinctly describe an existing paper. 2. That partial probate, to wit, of the first page, could not be granted, it being clear that this page did not express the full purpose of the testator. *Id.*
17. Where one of the subscribing witnesses to a will, to which there was an attestation clause, testified to the observance of all the requisite formalities in its execution, including the subscription by testatrix in both witnesses' presence, while the other did not remember that she subscribed in his presence, or that the attestation clause was read, *Held*, that the due execution was proved. *Taylor v. Brodhead*, 624.
 18. *It seems*, that the declaration, in the presence of another, by one who has affixed his signature to a paper, that the same is his last will, accompanied with a request that the latter attest it, is a sufficient acknowledgment of his signature. *Id.*
 19. An attestation clause is no part of the execution of a will, but is useful as an aid to the witnesses' memory, and as raising a presumption, where one or both witnesses are dead, of the truth of its recitals. *Id.*

See PUBLICATION OF WILL.

EXECUTORS AND ADMINISTRATORS.

1. A disputed claim of an executor, etc., against the decedent's estate, might be appropriately proved under the Revised Statutes, before an auditor on final accounting. *Matter of Gardner*, 14.
2. An executor has no authority to retain any of the assets of the estate in satisfaction of his debt or claim, until it has been proved to and allowed by the surrogate; and where he has assumed to do so, he is chargeable, on accounting, with the amount appropriated, as assets in hand, with interest. *Id.*
3. The testatrix, during her life-time, having a small income, was dependent for assistance, in the management of her business, upon one afterwards her executor, who had charge of her affairs, and collected her interest and dividends, etc., for more than fourteen years prior to her death. He was under no legal or moral obligations to render her gratuitous services, but never asked or received compensation. She often expressed gratitude to him and gave him certain articles of small value. Upon his accounting as executor, he claimed payment for such services. *Held*, 1. That the facts proved an implied contract on the part of decedent, to pay what the services were reasonably worth. 2. That the law implied an employment from year to year, and interest ran from the end of each year. 3. That so much of the claim as was based on services rendered before the commencement of six years prior to the death of testatrix, was barred by the statute of limitations. *Burnett v. Noble*, 69.
4. The testator, who died in 1854, by his will nominated A., B., C. and D., as executors and trustees, and directed that neither of them should

be accountable for more funds of the estate than he should actually receive under the will. A. and B. qualified forthwith; B. died in 1871; C. qualified in the same year, and D. qualified in 1872, notified A. and C. of his appointment, and offered to act. But the two latter continued to control and manage the estate; and on their accounting, D. applied for commissions from the date of his appointment. *Held*, that as the statute provides for an allowance of commissions on the settlement of an account for services, for receiving and paying out moneys, and does not authorize an equitable adjustment of commissions among several representatives, and as D. presented no account, had rendered no services, nor received or paid out any money, his application should be denied. *Walke v. Hitchcock*, 217.

5. As to whether D. would have a remedy at law against A. and C. for improperly preventing him from performing his duty as executor—*quære. Id.*
6. Where the language of a will shows an intent to confer upon persons named as trustees, the functions, also, of executors, the use of the former term, only, is to be deemed an inadvertence. *Richards v. Moore*, 278.
7. Where an executrix and two executors qualified, and the executors took upon themselves the exclusive management of the estate, not even consulting with the executrix, who never had possession of the assets, but allowed the executors to have entire control, reposing confidence in their integrity and capacity, *Held*, 1. That these circumstances relieved the executrix from liability for losses occasioned to the estate, by acts of the executors, committed without her acquiescence or consent, express or implied; but, 2. That she was liable for the result of any improper action of her co-executors, to which she consented, or which she could have prevented. *Lacey v. Davis*, 801.
8. Accordingly, where the co-executors (1) lent \$5,000, funds of the estate, without security, and (2) invested \$4,400 of the funds in the capital stock of a corporation; and it appeared that the executrix knew nothing of the loan, until long after it was made, and took steps to collect the amount lent, without success; and that she was not consulted as to the stock investment, but was informed that the shares received were a stock dividend, upon stock already held by the estate, and did not discover that they had been bought until after the accounting began—*Held*, that no liability attached to her, in the premises, although she had joined with her co-executor in rendering an account, under oath, of all their proceedings, which account included the unauthorized investments, coupled with the statement that the investments of the funds of the estate were made by the executors. *Id.*
9. But where the executors subscribed for bonds to the amount of \$10,000, to protect certain stock formerly owned by the testator, being assets of the estate, which they ought previously to have disposed of; and it appeared that the executrix knew, all along, that the estate held the stock, and made no effort to sell it, nor even asked the executors so to

- do; on the representatives' accounting, *Held*, 1. That the executrix, having acquiesced in keeping the stock on hand, was liable, with her co-executor, for the consequences of so doing. 2. That the accounting parties were to be charged with the amount subscribed for the bonds, and, it appearing that the stock had risen, they were to be credited with any increase in the price of the stock, over and above its value at the time when it should have been sold, *i. e.*, at the end of one year after the testator's death. *Id.*
10. The authorities upon the subject of the liability of an executor or trustee, for the *devastavit* of his co-executor or co-trustee—collated. *Id.*
 11. An administrator, etc., is not entitled to his commissions until they have been allowed by the Surrogate. *Carroll v. Hughes*, 337.
 12. Where there are several administrations on the estate of a decedent, the one granted in the country of his domicil is the principal one, and the others are ancillary. *Id.*
 13. The decedent died intestate while domiciled in the state of Pennsylvania, leaving next of kin in New York and in Ireland, and creditors, but no next of kin, in the state of his domicil. His brother, J., residing in this state, took possession of the bulk of decedent's personal property in Pennsylvania, amounting to about \$30,000, brought it to this state and obtained letters of administration here, on the ground of assets arriving here after decedent's death. Subsequently C. was appointed administrator, etc., of decedent in Pennsylvania, and, having intervened in the accounting of J., alleged that the latter had taken possession of the property wrongfully, and for the purpose of defrauding decedent's creditors in Pennsylvania, objected to the allowance of any of the credits in his account, and prayed for an order compelling the return of the property to the last-named state. J. was examined, and denied any fraudulent intent. *Held*, 1. That the validity of J.'s appointment could not be questioned on the accounting; and that, having rendered services, he was entitled to his expenses and commissions. 2. That the custody and distribution of decedent's estate belonged to the administrator appointed in the state of his domicil, whose title related back to the death; and therefore, 3. That J. had no right to withdraw the assets from Pennsylvania, the creditors in that state having the right to administration thereof under their local laws; and that the balance of assets in J.'s hands, after settlement of his account, must be remitted to C., upon proper security. *Id.*
 14. Administration granted by a Surrogate's court of this state, upon the goods, etc., of a resident of another state, is subsidiary to that granted in decedent's domicil, and relates^o only to assets here. *Black v. Woodman*, 303.
 15. Accordingly, where an administrator, appointed in Massachusetts, of the estate of one dying domiciled there, afterwards received letters in this state, which were revoked, and his successor, appointed here, applied for an accounting, alleging that, at the time of his removal, the former had property of the estate in his possession; the respondent de-

- nying that he had received any property under the letters revoked, *Held*, that the respondent could not be made to account, in a Surrogate's court of this state, for assets collected under letters granted in Massachusetts and brought hither, but that he might be required to submit to an examination as to the assets liable to be administered under the letters granted here. *Id.*
16. One of the executors handed to his co-executor, whom he supposed to be solvent, \$1,200 of the trust funds, on the suggestion of the recipient, who misapplied the amount and died insolvent, that he could use the same to the advantage of the estate. *Held*, that the surviving executor was liable to the estate for the loss. *Dixon v. Storm*, 419.
 17. The testator, who died in 1877, leaving real and personal estate, by his will (1) gave all to his wife for life, with remainders over to his children and grandchildren; (2) directed his executors to carry on his business as a tinsmith, etc., for the benefit of his wife during her life, with power to dispose of the stock in trade for her benefit; and (3) gave his store, shop, tools, fixtures, and stock in trade, after her death, to a grandson. Testator left business book accounts, due him, of over \$18,000, of which the executor collected about half, and mostly invested the same, paying to the widow interest on the investments, and profits of the continued business. At her death, in 1881, the aggregate amount invested in the business was found to be \$1,800, of which \$1,100 was cash derived from the book accounts, and \$200 was due for goods purchased. On the executor's accounting, it was contended by the legatees that this loss of \$1,100 should fall, not upon them, but upon the executor personally. *Held*, 1. That, under the circumstances, the testator must be held to have intended the sums collectible on those accounts to be used, so far as necessary, to carry on his business, it not being feasible to continue the same successfully, without any cash capital; and that the executor, having been guilty of no breach of trust, was entitled to reimburse himself for the loss of \$1,100 out of the fund employed in the business at the testator's death. 2. That the debt of \$200 stood upon the same footing, it being impossible for him to speculate as to the time, and cease business in anticipation, of the death of the tenant for life. *Boulev v. Tompkins*, 472.
 18. The statute, 2 R. S., 93, § 58, providing that, upon settlement of an executor's account, "the Surrogate shall allow to him" compensation, etc., is not mandatory. Its object was to furnish a definite and simple rule as to amount, to be applied in all cases where there should be need for the application of any rule at all; and not to restrict testators either from fixing compensation to the exclusion of statutory allowances, or from forbidding any compensation whatever. *Secor v. Sentis*, 570.
 19. *It seems*, that section 2737 of the Code of Civil Procedure, forbidding an allowance to an executor for whom the will provides a specific compensation, unless he renounces the latter, is not equivalent to a declaration that such a renunciation will in all cases entitle him to statutory commissions. *Id.*

20. The testator, by his will, granted to one of two executors, and to the wife of the other, one half of the residuum, and declared that the executors should receive no compensation or fees for their services in settling the estate. Accordingly, on their final accounting, the executors asked for fees. *Held*, that they could not have any. *Id.*
21. The testator, by his will, gave to his executors certain powers as trustees of his niece; authorized his "executors and trustees" to act collectively or individually in all matters appertaining to the estate; and, further, provided as follows: "I give and bequeath to each of my executors and trustees the sum of three thousand dollars, in lieu of *any and all commissions*, and in full compensation for their services in closing up my estate and making distribution thereof *in conformity with and on the conditions hereinbefore stated.*" The executors each received \$3,000, and upon their accounting in their capacity as testamentary trustees, asked for commissions as such trustees, contending that the provision for compensation contained in the will applied to them only as executors. *Held*, that such a construction would be contrary to the letter and spirit of the will, and that the application should be denied. *Brownson v. Roberts*, 576.
22. Thrift, integrity, good repute, business capacity and stability of character are "circumstances" which may be very properly considered in determining the question of "adequate security," upon an objection, under Code Civ. Pro., § 2638, to the issue of letters to one named as executor in a will, on the ground "that his circumstances are such that they do not afford adequate security to the creditors, or persons interested in the estate, for the due administration of the estate." The word "circumstances" does not refer exclusively to pecuniary responsibility. *Martin v. Duke*, 597.
23. The statute was by no means intended to restrict a person named as executor from acting as such, without a bond, simply because the testator was richer than himself. *Id.*
24. The testator, by his will, nominated his wife, M., and his sister, D., as executrices. Objections to granting letters testamentary to them were interposed, on the grounds that they were unacquainted with and incompetent to discharge the duties; that M. was about to absent herself from this state "for an uncertain period of time;" and that neither "the condition and circumstances" of M., nor those of D., afforded "adequate security to the persons interested," etc.; and objector asked that letters be refused unless they first gave adequate security for the administration of their trust. M. answered that she intended to continue her residence in this state, though she designed to make a summer visit in Europe, and that she had acquired a thorough knowledge of his property and its management from the testator. D. answered that she had had some experience in administering an estate, and owned real property worth \$200,000 in Brooklyn. *Held*, that, as D., at least, was pecuniarily responsible, and both she and M. had sufficient capacity and integrity to make their appointment prudent and proper,

aside from property considerations, the objections should be overruled and letters granted. *Id.*

25. In such case, the question for the court is,—is it safe to put this estate in the hands of the person named as executor; can he be trusted to administer it faithfully and honestly as directed by the will? *Id.*

See INVENTORY: LETTERS OF ADMINISTRATION.

EXPERTS.

See FORGERY; HANDWRITING, 2; TESTAMENTARY CAPACITY, 10; WITNESSES.

FOREIGN ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS, 12-15.

FOREIGN LAWS.

See EVIDENCE, 6.

FOREIGN WILL.

See SURROGATE, 2.

FORGERY.

The decedent lived with her husband for many years, without any evidence of alienation or discord, and died, leaving no parents or children. Several months after her decease, a paper alleged to have been discovered was propounded by her husband, as her will, whereby she left all her property to him. Evidence was adduced that this was in pursuance of an understanding had between them during her life-time. The probate was contested by various relatives of decedent, who would have been entitled to share in her estate in case of intestacy, and who attempted to prove that the signature of the testatrix, and of a deceased subscribing witness, were forgeries. The draughtsman, who was the surviving subscribing witness, did not at first recollect drawing and witnessing the will, but recalled the facts, from the statements to him of another who was present at the time, and from a memorandum in his diary. A great number of witnesses was examined upon each side, including two experts in handwriting, who testified against the genuineness of the contested signatures, but arrived at their conclusions by inconsistent theories. *Held*, 1. That the delay in producing the will was not necessarily suspicious, when explained by decedent's condition and associates, in her life-time. 2. That contestant's theory, that the forgetfulness of the draughtsman of the will was simulated, in order to give a semblance of verity and genuineness to a forged instrument in his own handwriting, was not tenable, as such forgetfulness was rather calculated to endanger the case, while a ready statement of the facts of drawing and witnessing the will would have been the most obvious mode of averting suspicion. 3. That the case turned upon the conflict between these experts and the draughtsman, and that, as he

had lived for many years in a community where he was well known, and had served as a justice of the peace, and in other capacities, and testified positively to all the facts of execution, and was corroborated by a memorandum in his diary and another witness, and no attempt had been made to impeach his character, his testimony must control, and the instrument be admitted. *Sarcent v. Hedra*, 47.

See HANDWRITING.

FUNERAL EXPENSES.

1. The widow of decedent received, from benevolent societies of which he was a member, certain sums, the intended disposition of which was indicated by their respective by-laws, etc., as follows: (1) from the death aid fund of Battery B, \$150, "to be paid on the death of a member, to the legal relatives;" (2) from Germania Lodge, \$100, "a funeral money, to be paid, on the death of a brother, to his widow, children, survivors, administrators, heirs or such others as shall be entitled thereto;" (3) from Central Aid Association, \$200, "to be received, on the death of a member, by those entitled to inherit, either under the will or by blood relationship (or the surplus, where the association has paid the funeral expenses);" (4) from Mount Horeb Camp, \$100, "to defray the funeral expenses." The widow, also the administratrix, on her accounting, charged the estate with \$218.10, the funeral expenses, but credited it with none of these sums. *Held*, that the manifest purpose of the last three donations was to defray the funeral expenses, and that the widow, having received more than the amount of those expenses, could not charge the same against the estate; but that the excess, beyond those expenses, did not belong to the estate of decedent, and the personal representatives were not accountable, in the Surrogate's court, therefor. *Leidenthal v. Correll*, 267.
2. The sum of \$40, for a burial plot, is a reasonable disbursement, as a part of the funeral expenses, where decedent's personal estate is \$1,200. *Chalker v. Chalker*, 480.

GIFT INTER VIVOS.

1. The testatrix was stricken with paralysis March 1, and died May 3, 1879, leaving a small estate of about \$1,200, of which the sum of \$1,125 was in savings bank. By her will, executed March 19, 1879, she bequeathed this sum in equal shares to her two sons, one of whom she appointed her executor. The latter had the chief care of her during the illness, and she died at his house. On his accounting, the executor omitted to charge himself with the \$1,125, claiming it as a gift *inter vivos*, from his mother. He testified that, on April 10, 1879, she proposed to give him the deposit, and signed an order on the bank, which was witnessed by her attending physician; that he drew the money and delivered it to her, whereupon she handed it again to him, requesting him to make good use of it, pay some debts, etc. The physician was not called. Objections to the account being filed,—*Held*, that, in view of the re-

lationship between decedent and the alleged donee, the burden of proof lay upon him to establish the fairness and propriety of the gift; that it was impossible to discover the mind and motives of decedent; that the circumstances of her illness, the unexplained annulment of her recent natural testamentary disposition, and the advantage of situation of the claimant, who alone testified to the transaction, led to the conclusion that the gift did not proceed from her own free will; and that the executor must account for the sum in dispute, as part of the estate. *Chalker v. Chalker*, 480.

2. To constitute a valid gift *inter vivos*, the act of the donor must have no reference to the future, must divest himself of all control over the subject-matter, and include a delivery to the donee. *Hoar v. Hoar*, 687.
3. Accordingly, where testator, in his life-time, had a deposit in a savings bank, which was claimed, after his death, by his widow, as a gift *inter vivos*, and the only evidence in support of her claim was a declaration by testator to third persons, that he had given her the money in the bank,—that he had given her the bank-book,—that it was hers; the bank-book not having been delivered,—*Held*, no gift, for want of delivery. *Id.*
4. *It seems*, that a delivery of the bank-book would have perfected the gift of the deposit. *Id.*

GUARANTY.

See MORTGAGE; SURETY.

GUARDIAN AD LITEM.

1. The Surrogate's court has power, independently of statute or rule, to allow to the guardian *ad litem* of an infant party, a reasonable compensation for his services. This power is recognized by the Code of Civil Procedure, and the rules of court (§ 17; rule 50). *McOus v. O'Hara*, 386.
2. Section 2558, subd. 3, of that Code, which excepts an infant's guardian from the prohibition to award costs to an unsuccessful contestant of a will, does not limit such compensation to the taxable costs. *Id.*
3. Chapter 18 of the Code of Civil Procedure has not made any material change in the mode of appointing special guardians for infants, in proceedings before Surrogates. *Matter of Ludlow*, 391.
4. Under section 2530 of that Code, the Surrogate "must" appoint a special guardian, where the infant does not appear by his general guardian, and where he does so appear, the Surrogate must inquire into the facts and must appoint a special guardian, if, for any reason, the interests of the infant require it. No application for the appointment of a special guardian is necessary; the Surrogate may act of his own motion. *Id.*
5. *It seems*, that under section 2531, the infant may apply for the appointment of a special guardian. Notice must be given under that section, only when the application is by a person other than the infant. *Id.*

GUARDIAN AND WARD.

1. The mother of a minor, in the absence of a father, has the right to influence and direct the conduct, residence, education, occupation and associates of her child. *Matter of Barré, 64.*
2. Although, by section 2821 of the Code of Civil Procedure, the Surrogate's court has authority to appoint a guardian of an infant whose parents are living, such authority should not be exercised except in cases where the parents appear to be unfit for the control of, or to have interests adverse to the infant. *Id.*
3. The petitioner, an infant aged nineteen years, had become alienated from, and abandoned the home of her mother, who was willing and able to provide for her, and against whose wish she insisted on associating with a theatrical manager of inferior plays, as an actress. She prayed that one D., at whose house she had interviews with the manager, be appointed guardian of her person and estate. *Held, 1.* That, in the absence of evidence to impugn the good character and ability of the parent, or to show that she had forfeited her parental authority, it would be judicial usurpation for the court to intervene between her and her child, and the petition should be dismissed. *2.* That this result was not altered by the fact that on the hearing the mother withdrew her objections to the appointment of the proposed guardian, it appearing that the proceeding was an effort to set the mother's authority at defiance. *Id.*
4. The mother of an infant, before her death, confided the custody of her child, who was of tender years, to the petitioner, to maintain and educate in her religious faith. Upon *habeas corpus* by an aunt, to obtain possession, the supreme court awarded the custody of the infant to the petitioner; whereupon another aunt, without mention of those proceedings, procured, from the Surrogate's court, letters of guardianship, which petitioner applied to have so modified as to award the custody to herself. *Held,* that the application of the aunt for letters of guardianship was an attempt to circumvent the order made on *habeas corpus*; that the petitioner had a right to institute these proceedings; and that the letters should be revoked, as to the infant's person, and the petitioner be appointed guardian thereof, unless the guardian should traverse the allegation that the infant's interests required the appointment of another guardian. *Bolling v. Coughlin, 116.*
5. The words "in his behalf," at the beginning of Code Civ. Pro., § 2832, refer to "the ward," and not to "any relative;" the intention of the section being to enable any person to apply for a revocation of letters of guardianship, as where no relative of the infant is willing to make the application. *Id.*
6. As to whether a suppression of facts is equivalent to a "false suggestion of a material fact," under subd. 4 of that section, *quare. Id.*
7. The guardian of a female infant expended, for her support, education, etc., \$800 more than the amount of her estate in his hands, this over-

- payment, however, being less than her interest in the estate of her deceased father, whose will provided that the *income* of her share, in the hands of the executor, might be used for her support. Upon his accounting, at the ward's majority, the guardian sought to be reimbursed from the ward's interest in the latter estate. *Held*, 1. That the court had no power to require a violation of the provisions of the will. 2. That the guardian had no right to make advances to the ward while an infant, and afterwards hold her liable therefor. 3. That the guardian should be allowed his disbursements to the extent of the ward's estate in his hands, and also to the extent of the *income* realized by the executor upon the ward's share in her father's estate. *Smith v. Bizby*, 196.
8. Where the mother, and also a friend of the deceased father, of an infant of ten years, entitled to a small estate, petitioned separately for the guardianship of his person and property, and it appeared that the infant had, for three years, resided with, and been cared for by the latter petitioner, to whom the father had informally intrusted him; that the father had been for several years separated from his wife, for her fault; and that she was engaged in a disreputable business, while the other petitioner was a suitable person,—*Held*, that the mother's petition should be denied, and the other granted. *Burmester v. Orth*, 259.
 9. *It seems*, that the declared wishes of the deceased father of an infant of tender years, as to his custody, should, in the absence of a testamentary disposition, have little weight against the lawful claims of the mother; who, if a suitable person, and able to maintain and educate the infant, is entitled to the guardianship. *Id.*
 10. Section 2852 of the Code of Civil Procedure, which provides that a testamentary guardian who does not qualify within thirty days after probate of the will shall be deemed to have renounced, is inapplicable to a will proved before September 1, 1880. *Geoghegan v. Fbley*, 501.
 11. Under Laws 1877, ch. 200, the only method of defeating the rights of a testamentary guardian was by proceedings taken to compel him to qualify within a time specified. *Id.*
 12. *It seems*, that before the enactment of that chapter, the right of such a guardian to act was derived solely from the appointment in the will (2 R. S., 150, §§ 1, 2). *Id.*
 13. Where letters were issued to a testamentary guardian February 26, 1878, the decree admitting the will to probate being entered as of March 4, 1878, it appearing, from recitals in the letters and otherwise, that the entry, as of that date, was an inadvertence, and that the date of admission was in fact earlier than that of the letters; on an application to revoke the letters, made after the guardian had been actively engaged for nearly four years in the execution of his trust, by one who was appointed guardian in 1880,—*Held*, that the decree should be amended by dating it February 26, 1878; that the letters of the guardian last appointed should be revoked; and that the petition of the latter for revocation of the former guardian's letters should be denied. *Geoghegan v. Fbley*, 501.

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HABEAS CORPUS.

See GUARDIAN AND WARD, 4.

HANDWRITING.

1. Testimony as to similarity of signature is much more persuasive and satisfactory than evidence of dissimilarity, it being the uniform experience that the signatures of a person often vary materially, owing to such causes as posture, nervous condition, freedom from interference, quality of material, and other circumstances. *Sarvent v. Hesdra*, 47.
2. Expert testimony as to handwriting is especially open to criticism, there being a lack of any standard, such as exists in the case of the medical or chemical expert, whereby to test the soundness of the opinions advanced. *Id.*

See FORGERY.

HUSBAND AND WIFE.

See MARRIAGE.

IDIOCY.

See TESTAMENTARY CAPACITY, 1, 2.

INDORSER.

1. Where the indorser of a promissory note appoints the holder his executor, and dies before its maturity, his estate is discharged from liability by the failure of the executor duly to present the note to the maker for payment. *Schumaker v. Quaritus*, 351.

See SURETY.

INFANT.

See GUARDIAN AD LITEM; GUARDIAN AND WARD; WILL, 1.

INSANE DELUSION.

See DELUSION.

INSANITY.

See DELUSION; TESTAMENTARY CAPACITY.

INSOLVENCY.

See CONTEMPT, 4.

INSPECTION.

See DISCOVERY AND INSPECTION.

INTEREST.

See EXECUTORS AND ADMINISTRATORS, 3; LEGACY, 6; LIFE TENANT, 4, 6; TESTAMENTARY TRUSTEE, 8; WILL, 18.

INTERPRETATION OF STATUTE.

In the interpretation of a statute, it is the duty of the court to consider the object of its enactment, and the mischief which would result from a literal construction. *Pearson v. Elmer*, 181.

INTERPRETATION OF WILL.

It is a cardinal rule of construction that effect must be given, if possible, to every part of a will. *Steinle v. Oechler*, 312.

See SURROGATE, 3; WILL.

INVENTORY.

1. *It seems*, that it is not permissible, after procuring an order requiring an administrator to sell property, upon allegations that it is inventoried at too low a price, and that the administrator should be charged with the actual value, as disclosed on a proper sale, which has been had, to claim that the inventory valuation shall be a measure of the charge against him. *Woodhouse v. Woodhouse*, 181.
2. The Surrogate's court has no power, upon an application to amend an inventory of a decedent's estate, to determine the ownership of property, the title to which is disputed. Accordingly, where the applicant seeks to have inserted, in an inventory filed, property which the executor or administrator claims, under oath, as belonging to himself, the motion should be denied. *Greenhough v. Greenhough*, 191.
3. Sections 2715 and 2716 of the Code of Civil Procedure have not changed the statutory requirements as to the contents of an inventory. *Id.*

JUDGMENT.

See RECEIVER, 2.

JUDICIAL SETTLEMENT.

See ACCOUNTING, 3, 12.

LEGACY.

1. The testator, by his will, gave all his property to his wife, unless she died before him, and in that case to others, including a legacy of \$2,000 to A. By a first codicil, he revoked this legacy to A.; by a second codicil he confirmed the will and the first codicil, so far as consistent with the second; and bequeathed legacies, etc., to others than his wife, to the amount of \$18,500, gave his wife's wardrobe and jewels to B., "ac-

- cording to her directions," and the residue to his nieces. Upon an application, by the widow, for a construction of the instruments, *Held*, that the last codicil was obviously intended to be conditional on the non-survival of testator's wife, and that, this contingency not having happened, she was entitled to the entire estate. *Matter of Jackson*, 129.
2. The testator, by the second clause of his will, gave all his estate, real and personal, to his wife, "to have and to hold during her natural life;" by the third, he gave a specific legacy to his daughters, to take effect at his widow's death; by the fourth to the eighth clauses, he gave devises to descendants, to take effect at his widow's death; by the ninth clause, he gave legacies to descendants, payable at his death; by the eleventh clause, he gave to petitioner, his daughter, a widow without means, a legacy of \$6,000, not specifying the time of payment. Upon an application by the daughter, for payment within a year, on giving security, the executors contended that the legacy was payable only on the death of testator's widow. *Held*, 1. That, by omitting, in the eleventh clause, the restriction contained in the third to the eighth clauses, the testator revoked, *pro tanto*, the second clause, and made the legacy payable before his widow's death. 2. That the legatee's condition raised a presumption that the legacy was designed to meet her necessities during the widow's life-time. 3. That the legacy was payable, as in ordinary cases under the statute, at the end of a year from the grant of letters testamentary. *Tuttle v. Heidermann*, 199.
 3. Under Code Civ. Pro., § 2719,—which permits the Surrogate to decree payment to a legatee or distributee, within a year after the grant of letters, where it appears that the funds in the representative's hands "exceed by at least one-third the amount of all known debts and claims against the estate," etc,—the required surplus of one-third is to be estimated by excluding the amount of the petitioner's claim and payments already made. *Id.*
 4. Where a legatee applies to the Surrogate's court for payment of the legacy, an answer by the representative "that the petitioner's legacy is not yet payable by the terms of the will," does not raise such an issue as requires the petition to be dismissed under Code Civ. Pro., § 2718. It raises no issue of fact, but only a question of the construction of the will. *Steinle v. Oechler*, 812.
 5. The testator, by his will, gave to his wife one-half of his property, real and personal, absolutely, and the other half to her for life, with power to sell. He then gave a legacy of \$2,000 to an infant, to be paid to him at his majority; and, in case of his death during infancy, the same was given to the testator's brothers and his sister, the petitioner. The infant legatee died before the testator. Upon an application by the sister, during the widow's life-time, to compel payment of the legacy. —*Held*, that, upon testator's death, the legacy vested in his brothers and sister; but that the intent of testator was that the legacy should not be paid until after the death of his widow; that the petition was, therefore, premature, and should be dismissed. *Id.*

6. The testator, by his will, gave to his granddaughter, an infant, a legacy of \$1,000, to be paid to her at majority ; in case she died in infancy, one-half of that sum to go to her mother. He bequeathed the residue of his estate to a nephew. The granddaughter claimed to be entitled to interest on her legacy until her majority. There was no evidence that testator had assumed the relation of a parent towards her. *Held*, 1. That the testator being neither the father of, nor one *in loco parentis* to the legatee, she was not within the exception which allows, in such cases, where the will makes no provision for the infant's support, interest on a legacy before the time when the latter becomes payable. 2. That interest on the \$1,000, during the legatee's infancy, belonged to the residuary estate. *Harward v. Hewlett*, 330.
7. The testator, by his will, gave the income of \$2,000 to A. and B. for their lives and that of the survivor, and the principal thereafter to petitioner, directing the executrix and executor to invest the fund. He also gave a legacy of \$10,000 to G. The executrix, also the residuary legatee, having alone qualified, omitted to invest the \$2,000, but, on the death of B., paid said principal sum to A., and died. A. died insolvent. The executor, having qualified generally as executor, received \$10,000, assets of the estate, and paid G.'s legacy, but made no attempt to collect the \$2,000 misapplied by the executrix, from her estate, which was solvent.—*Held*, that, the legacy of \$2,000 never having been separated from the general fund in the hands of the executrix, and the executor having qualified generally, he could not claim that he was not clothed with any of the *trusts* under the will; that, though not responsible for the misapplication of the fund by the executrix, he should have collected the amount from her estate; and was liable to the petitioner for the amount of his legacy, with interest from the death of A. *Wise v. Murphy*, 365.
8. Whether payment to a legatee can be decreed under Code Civ. Pro., § 2603, *quære*. *Peck v. Sherwood*, 416.
9. The common law rule, that a legacy is, in general, payable at the end of one year after the testator's death, and the modification of that rule, contained in 2 R. S., 90, § 43, are inapplicable to the case of a legacy given by the execution of a power of appointment contained in the testator's will. *Dixon v. Storm*, 419.
10. The testator, by his will, after certain bequests, gave the residue of his estate, real and personal, to his wife for life; empowered his executors to sell any of the real estate, with her consent; directed them, as soon as practicable after her death, to sell all the real estate, and pay one-half the proceeds, and one-half his personal estate, to an appointee to be named in her will. The widow died, leaving a will appointing H. and A. to receive \$5,000, under the power. They had purchased some of the real estate during her life-time, and had given a purchase-money mortgage, which was foreclosed before she died, leaving a deficiency of \$3,000, for which judgment was entered after her decease. Meanwhile, the appointees had assigned their legacy to W. *Held*, 1. That

the testator's intent was that the legacy of his widow's appointee should vest immediately upon her death, and that interest than began to run; and that this result was not affected by the fact that sufficient real estate had not been sold to make the payment. 2. That the judgment of \$3,000 must be set off against the legacy; the deficiency being liquidated before the widow's death, and the assignee having actual or constructive notice of the facts. *Id.*

11. *It seems*, that the assignee, for an antecedent debt, of an insolvent legatee, is liable in equity to a set-off of his assignor's indebtedness, against the legacy, even though the latter is not yet payable. *Id.*
12. The claim of a legatee under a bequest upon a *contingency*, or where there is a possibility coupled with an interest, is assignable in equity; otherwise as to a bequest upon a *condition precedent*, before performance. *Spencer v. See*, 442.
13. M. died in 1871, leaving both real and personal estate, three grandsons, A., B. and C., his only descendants, and a will whereby, after certain bequests, he ordered his executors to invest the residue of his realty and personalty on bond and mortgage, the interest to accumulate until the times afterwards mentioned. He then devised and bequeathed to A. one-third, and to C. one-third of his realty and personalty, to be paid to them respectively at marriage. The remaining one-third he devised and bequeathed to A., at his marriage, in trust to pay the interest thereof semi-annually to B., "upon the express condition" that the latter renounce the Roman Catholic priesthood, payment of interest to commence at the time of renunciation; and, upon condition that B. should marry, he devised and bequeathed such third, with accumulations, to B., absolutely. Should B. die before marriage, his share was given to A., at marriage. M.'s will empowered but did not order, his executors to sell and convey any and all of his realty. C. married in 1879, and received his third. On September 2, 1881, A. married; on September 15, B. released and assigned, under seal, to A., all his rights under the will, and A. received from the executors \$23,000, on account of the two shares; on September 26 A. died, leaving a will. A contest arising between the executors of M. and of A., on the formers' accounting, as to the ownership of B.'s third,—*Held*, 1. That, the scheme of the testator, M., requiring a conversion, the will must be deemed to treat of personalty only. 2. That the bequest of B.'s third was not upon a *contingency*, but upon *conditions precedent*, neither of which had been performed; that, therefore, the legacy did not vest in interest, and nothing passed by B.'s assignment to A. 3. That A. had a possibility coupled with an interest in B.'s third, and should B. never renounce or marry, his third would pass to the representatives of A. 4. That the fund of which A. was made trustee passed into the hands of his executors. *Id.*
14. Whether the Surrogate's court has power to appoint a trustee of a fund in such a plight, *quære*. *Id.*
15. The testator, by his will, executed on the day before his death, gave

certain legacies, as follows: by clause (7), "unto St. John's Guild, a corporation created by and existing under the laws of the State of New York, the sum of \$5,000;" by clause (8), a legacy to the "Societe Francaise des dames de l'Eglise de St. Vincent de Paul a New York," an unincorporated association; by clause (9), "unto the person acting as the treasurer for the time being, meaning the treasurer, if there be one, of the Foundling Asylum for Babies, Lexington avenue and Sixty-eighth street, New York city, to be applied to the uses of said asylum, the sum of \$3,000;" by clause (10), a legacy to the treasurer of the House of the Good Shepherd. The St. John's Guild was organized under the act for the incorporation of benevolent, etc., societies, *Laws* 1848, ch. 319, which invalidates a gift to any corporation formed thereunder, contained in a will executed less than two months before the testator's death. The ninth clause described an institution not existing, but there was located, at the place mentioned, a corporation organized under the act of 1848, named "The Foundling Asylum of the Sisters of Charity in the City of New York." The validity of these bequests having been put in issue,—*Held*, 1. That clause (7) was void under the act of 1848. 4. That clause (8) was valid. 3. That clause (9), though not void for uncertainty as to the legatee, was void under the act of 1848, it being not competent for the testator to evade the policy of that statute, by the simple device of making the gift to an individual, and the bequest being, in legal effect, one to the last-mentioned foundling asylum; and that clause (10) was void, for a like reason. *Effray v. Foundling Asylum*, 557.

- 16 The testator, by his will, bequeathed to trustees \$65,000, to be invested by them on bond and mortgage, directing them to collect the interest and pay the same to testator's son, C., for life; and he bequeathed the principal and interest thereof, on C.'s death, to C.'s children, "to be paid over and equally divided" among them, at the majority of the youngest survivor of them. The will was proved in 1862. C. died in 1890, leaving him surviving his only living child, who petitioned for payment of his legacy, alleging a demand upon, and a refusal to pay by, the trustees. It appeared, on a reference, that the trustees had invested the fund as directed by the will, and that, the same having depreciated without their fault, they tendered the securities, etc., belonging thereto to the petitioner, who refused to receive the same, claiming to be entitled to \$65,000, in full, as a demonstrative legacy. *Held*, that the intent of testator, as manifested by the clause providing for an accumulation of interest in case C. should leave a minor child, was that the identical fund, which furnished a life income to C., should, after the latter's death, pass to his children; and that the trustees were not bound to supplement such fund out of the body of the estate, in a sum sufficient to make the value of petitioner's interest \$65,000. *Bushnell v. Drinker*, 581.
17. The referees having found that the trustees had made an improvident investment of a portion of the trust funds, for which the petitioner

might hold them answerable; and it appearing, from documents on file, that, upon an accounting by them, in 1879, which petitioner was cited to attend, a decree was made settling their account and allowing them full credit for the funds invested in the manner questioned,—*Held*, that such decree was conclusive against petitioner in the proceeding at bar. *Id.*

See ACCOUNTING, 10, 18; ANNUITY; EVIDENCE, 7; EXECUTION OF WILL, 12.

LETTERS OF ADMINISTRATION.

1. Where, after the verification of a petition for letters of administration upon the estate of a decedent alleged to have died an inhabitant of, and left assets in the county, and before the grant thereof, one to whom foreign letters had been granted applied for ancillary letters here,—*Held*, that, under Code Civ. Pro., § 2696, the former application, not having been disposed of, might be granted, and that it was not necessary to refer the question of decedent's residence, or to appoint a temporary administrator, to collect rents about falling due. *Weed v. Waterbury*, 114.
2. Upon an application for letters of administration, an opposing party, interested under a will claimed to have been destroyed, must not only prove that the will was not legally revoked, but be able to prove the will itself; and this in the same proceeding. The court cannot look into prior proceedings for probate, to find evidence on the subject. *Matter of Demmert*, 299.
3. Accordingly, where the applicant for letters of administration swore that decedent died without leaving a will, and those claiming that a will had been made and destroyed adduced no evidence,—*Held*, that the proof, on the part of the applicant, was sufficient under Code Civ. Pro., § 2661, and that his petition should be granted. *Id.*

See MARRIAGE.

LETTERS TESTAMENTARY.

See ANCILLARY LETTERS; EXECUTORS AND ADMINISTRATORS, 24; LETTERS OF ADMINISTRATION.

LIFE TENANT.

1. The rational and equitable rule by which to determine the relative rights of the life tenant and remainder-man, in respect to stock dividends in corporations, in whose stock the fund is invested, is to inquire how much of the stock dividend was capital, or made to represent an increase in the value of the property, and how much came from income or earnings; and also how much of the stock dividend was made up of

accumulations before, and how much from earnings after the investment. *Cragg v. Riggs*, 82.

2. The testator, by his will, gave his residuary estate to his five sons and one daughter, in equal shares; the daughter's share, however, being vested in his executors, in trust, to invest the same, and pay to her, during her life, "the net interest, dividends, or other periodical income thereof," the principal, upon her death without issue, going to her surviving brothers. The daughter having died without issue, the executors, at the instance of her administrator, filed their accounts, wherein they credited certain stock dividends made by various railroad corporations, whose stock they held, to capital account, whereby these accrued solely to the benefit of the remainder-men. *Held*, that, there being no suggestion that the stock dividends represented anything but income or profits of the corporations, the accounts must be corrected by crediting the dividends to income account, and discharging them from the capital account, and the proper proportion be paid to the administrator of the tenant for life. *Id.*
3. The authorities, with reference to the relative rights of life tenant and remainder-man in such a case, collated and discussed. *Id.*
4. The testator, by his will, divided his residuary estate among his children, directing his executors, as trustees, to invest, in their own names, each child's share, and to receive the interest and income of each share, for the use of the children, respectively, during life, with remainders over. Under an offer of the United States Government, to give its four per cent. bonds in exchange for an equal amount of outstanding six per cents., known as five-twenties, and pay accrued interest, together with three months' additional interest on the latter, the surviving trustee exchanged five-twenties, trust funds, and credited the accrued and additional interest thereon to income, and three months' interest on the four per cents., received in exchange, to capital account. The life tenants claimed the double interest for the three months after the exchange. *Held*, that the trustee's account was right in substance, but wrong in form, and that, 1. The accrued interest on the five-twenties, and all interest on the four per cents., belonged to the life tenants. 2. That one-third of the three months' additional interest on the five-twenties inured to the life tenants as an equivalent for the abatement of income, and the residue belonged to the remainder-men, as an accretion to the capital. *See v. Roosevelt*, 121.
5. As between these classes of claimants, anything in the nature of premium, that is, any appreciation in the value of capital, is to be regarded as principal, and all interest, income or proceeds, however extraordinary or unusual, belong to the life tenant. *Id.*
6. The testator, at his death, owned a judgment of foreclosure, for more than \$8,000, and a mortgage, on which \$5,700 was due. On a sale, under the judgment, the executor bid in the premises, and afterwards sold them for \$7,500, and, on foreclosure of the mortgage, he received, as net proceeds of sale, \$6,100. Upon a question between life tenant

and remainder-man, interested under the will in these funds, as to the proper apportionment, and the rate of interest to be employed in the calculation,—*Held*, 1. That, in the absence of any rule in this country as to interest rate, five per cent. should be adopted, in analogy to the English rule of three per cent. 2. That a principal sum, which, with interest from the testator's death to date of realization, would produce the amount realized, should be carried to capital account, and the residue to income. *Roosevelt v. Roosevelt*, 264.

See SUSPENSION OF OWNERSHIP.

LIMITATIONS, STATUTE OF.

1. An executor has no right to waive the defense of the statute of limitations to the claim of another against the estate; and the payment of a claim barred thereby cannot be credited to him on the accounting. *Burnett v. Noble*, 69.
2. A proceeding in the Surrogate's court, to establish an executor's claim against the estate, is analogous to the commencement of an action therefor; and the same defenses, including the statute of limitations, may be interposed, as in an action. *Id.*
3. The immunity of the estate from a claim barred by that statute should be more rigidly enforced where the representative holds the claim than in other cases. There being no such thing as the presentation and admission or dispute of a claim made against an estate by its representative, there can be no revival of such a claim when barred. *Id.*
4. The three years' limitation, contained in Code Civ. Pro., § 2750, of creditors' proceedings to dispose of a decedent's real property for the payment of debts, etc., applies to a case where letters had been issued upon his estate more than three years before September 1, 1880, and the personal representatives had not accounted to the Surrogate, under the Revised Statutes, before that date; since, in such a case, no right had accrued, to be saved by L. 1880, ch. 245, § 3, or by section 3352 of the Code. *U. S. Life Ins. Co. v. Jordan*, 207.
5. Chapter 4 of that Code has no application to proceedings of this nature. *Id.*

See EXECUTORS AND ADMINISTRATORS, 3; REVOCATION OF PROBATE, 3, 4.

LOST WILL.

See WILL, 8-8.

LUNACY.

The appointment of a special guardian for a party as a lunatic, upon an allegation of a petitioner in a proceeding for another purpose, is a mere matter of routine, and not an adjudication of lunacy. *Spencer v. Popham*, 425.

See DELUSION; TESTAMENTARY CAPACITY.

MARRIAGE.

1. Although no form, right or ceremony is essential, in this State, to the validity of a marriage, it does not follow that any cohabitation, with whatever motive begun, may, by the false acknowledgment of the marital relation, kept up for a time, grow into a lawful state of matrimony. To raise a presumption of the fact of marriage, from that of cohabitation, the latter must be matrimonial, and not illicit, in its inception. *Byrnes v. Dibble*, 383.
2. The petitioner, having applied for letters of administration upon the estate of decedent, a tug-captain, who died suddenly in February, 1881—leaving brothers and sisters his only next of kin—on the ground that she was his widow, it appeared that she and decedent began to cohabit in the latter part of 1879; that he took her to a respectable boarding-house, introduced her in society as his wife, took out a policy of life insurance in her name as his wife, and wrote her a letter signing himself her husband. In May, 1880, they having had an affray, she sued him for an assault in her own name, which she stated to be Helen Dibble. This action was settled, but, before its termination, he resumed his relations with her, again introduced her as his wife, and lived with her until his death. It further appeared that petitioner had stated, on one occasion, that decedent had been visiting her; also that decedent, in admitting, when asked, that he was married, had made inconsistent statements as to the length of time since his marriage, and had once denied that petitioner was Mrs. Byrnes; also that he had introduced another woman as his wife. And contestants adduced evidence tending to show that petitioner was a woman of loose character, who had been married, had a child, left her husband, and gone to live with another man, before living with decedent. There was no proof of any express marriage contract. *Held*, that the contradictory declarations of decedent, the character and conduct of the parties, and the many suspicious circumstances which petitioner did not controvert, led to the conclusion that she was not the widow of decedent, and that her petition must be denied. *Id.*
3. Where a woman flees from her husband and enters immediately on illicit relations with another man, which she continues for five years, there is no presumption at the end of that time, in the absence of evidence to the contrary, that her husband is dead. *Machini v. Zanoni*, 492.
4. The petitioner was married to M. in 1855, and lived with him in New York city until 1861, when she suddenly left his house, and, going to premises provided by decedent, cohabited with him until his death, in 1881, never again seeing M., or concerning herself about him. The cohabitation with decedent was confessedly meretricious until 1865, during which year, according to petitioner's testimony, a sort of ceremonial occurred, which she deemed a marriage between them. On her application for letters of administration, as being decedent's widow, on the ground that, although she and M. had not been separated for five

years when her alleged marriage with decedent occurred, their continued cohabitation after the lapse of that period, and the fact of their holding themselves out as husband and wife, raised the presumption of a marriage which was valid until annulled, under 2 R. S., 139, § 6. making such a provision in a case where a "person, whose husband or wife shall have absented himself or herself, for five years, shall marry," etc.,—*Held*, that M., not having "absented himself," the statute did not apply, and that, there being no proof or presumption of his death, any marriage between petitioner and decedent was absolutely void under 2 R. S., 139, § 5, and the petition should be denied. *Id.*

See ANNUITY, 1.

MENTAL CAPACITY.

See TESTAMENTARY CAPACITY.

MINOR.

See GUARDIAN AD LITEM; GUARDIAN AND WARD; WILL, 1.

MISDESCRIPTION.

See ANNUITY, 1.

MONOMANIA.

See DELUSION; TESTAMENTARY CAPACITY, 5.

MORTGAGE.

The mere omission, by the holder of a bond and mortgage, to proceed against the mortgagor, does not, in the absence of a request by the guarantor, discharge the latter, though the value of the land has depreciated so as to be inadequate to pay the amount due. *Hurd v. Callahan*, 393.

MORTUARY MONUMENT.

1. The testatrix, by her will, directed her executor to erect a suitable monument over the graves of herself and husband, and left the selection of the style of such monument, and the expense thereof, entirely discretionary with him. The executor asked, upon the accounting, to be allowed the sum of \$700 for such purpose. The amount of the personal estate, for distribution, was less than \$2,000. *Held*, that no greater sum than \$250 should be allowed. *Burnett v. Noble*, 69.
2. The sum of \$200 is not an extravagant expenditure for a tombstone, where decedent's personal estate is \$26,000. *Campbell v. Purdy*, 494.

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OBJECTIONS.

See ACCOUNTING, 5, 17; EVIDENCE, 8; EXECUTORS AND ADMINISTRATORS, 24.

OFFICIAL BOND.

See EXECUTORS AND ADMINISTRATORS, 22-25; SURETY.

PERSON INTERESTED.

See ACCOUNTING, 14; PUBLICATION OF WILL, 2, 4; REVOCATION OF PROBATE, 1.

POWER OF APPOINTMENT.

See LEGACY, 9, 10.

PREFERRED CLAIM.

1. A money judgment entered against a decedent after his death, upon a verdict rendered during his life-time, relates to the time of the verdict, and is a judgment "docketed against the deceased," and entitled to priority of payment, in the course of administration, under 2 R. S., 87, § 27, subd. 8. *Matter of Dunn*, 27.
2. It is not necessary that an order be obtained, in such a case, to enter the judgment, *nunc pro tunc*, as of the term prior to decedent's death. *Id.*
3. The petitioner, having brought an action against the testator for rent due, procured a verdict against him for the amount claimed, the exceptions being ordered to be heard in the first instance at the general term. After the argument, and before the decision upon the exceptions, the defendant died, and thereafter judgment was entered against him for \$702.24, which judgment petitioner asked to have paid as a preferred debt, alleging that the estate was insolvent, and that ample assets were on hand, to make the preferred payment. *Held*, that the judgment was entitled to preference under the Revised Statutes, and—the allegation of sufficient assets not being disproved—payment was ordered, subject, however, to the deduction of a certain sum adjudged as costs, against the petitioner, upon an appeal from an order in his action. *Id.*
4. Taxes assessed during the life-time of a decedent, upon real property in which he had a *life estate*, and remaining unpaid at the time of his death, are entitled to preferential payment out of the personalty left by him, under 2 R. S., 87, § 27, subd. 2, which assigns a second preference to "taxes assessed upon the *estate* of the deceased previous to his death." *Coleman v. Coleman*, 524.

PRIVILEGE OF WITNESS.

See WITNESS, 6-9.

PRIVILEGED COMMUNICATIONS.

1. Upon the hearing of a contested application for the probate of a codicil to a will, a witness, who was an attorney, was asked by contestants to state a conversation had between him and decedent, relating to the preparation by him, for decedent, of a codicil not executed, subsequently to the execution of the instrument propounded. *Held*, privileged, under Code Civ. Pro., § 835, and excluded. *Pearsall v. Elmer*, 181.
2. *It seems*, that the rule would be otherwise, as to conversations, etc., relating to the paper presented for probate. *Id.*
3. The protection afforded to a client by the section of the Code cited does not cease with his death, but may be invoked by his executor, on proceedings for probate, before admission of the will. *Id.*

PROBATE OF WILL.

1. The setting aside or rejection of a will by a court is the exercise of a radical judicial prerogative, which should not be indulged, except upon very satisfactory proofs. *Merrill v. Rolston*, 220.
2. One who is next of kin to a decedent has an interest which entitles him to contest the probate of an alleged will of the latter; and the same is true of one who, by the admission of the will, would be deprived of rights under a former one. *Id.*
3. The Code of Civil Procedure has no application to proceedings for probate, commenced by service of the citation on all the necessary parties in 1872. *Lafferty v. Lafferty*, 326.
4. The administrator of a mortgagee, in a mortgage executed by a devisee under a will, is a "person interested in the estate," within *Laws* 1837, ch. 460, § 4, and might "have such will proved before the proper Surrogate." He might, therefore, also intervene and ask to be made a party to proceedings instituted for its probate. *Id.*
5. *It seems*, that section 2617 of the Code of Civil Procedure, giving such right of intervention to any person "interested in sustaining or defeating the will" merely formulates the pre-existing law. *Id.*
6. One who has not been formally made a party to probate proceedings cannot make any motion therein. *Id.*
7. *It seems*, that such proceedings do not abate by the death of all the parties, but may be revived by bringing in the successors to the rights and interests of the deceased parties. *Id.*
8. While it is true, as laid down in *Delasfeld v. Parish* (25 N. Y., 9), that it is not the duty of the court to strain after probate—neither should it, on the other hand, strain against probate, where the will seems unfair, but, if the testator appears to have had capacity, care should be taken to carry out his wishes. *Legg v. Myer*, 628.

See ANCILLARY LETTERS; DELUSION; DISCOVERY AND INSPECTION. 2;
EXECUTION OF WILL; PRIVILEGED COMMUNICATIONS;
REVOCATION OF PROBATE.

PUBLICATION OF WILL.

1. It is not necessary that the declaration of a testator, that the instrument signed by him is his will, should be made in the very act of signing. It is sufficient if the acts be done on one occasion, and form parts of the same transaction. *Matter of Collins*, 20.
2. Acts constituting sufficient publication considered. *Id.*
3. The decedent requested A. to ask a scrivener to come and draw his will, at the same time stating that he wished A. to be a witness. On a subsequent day—that of the execution—A. and another signed as subscribing witnesses in decedent's presence, after the will had been read in their presence, nothing further being said to A. about signing, but the other witness being duly requested. *Held*, a sufficient request to A. *Brady v McCrosson*, 431.

See EXECUTION OF WILL.

REAL PROPERTY.

See SALE OF REAL ESTATE.

RECEIVER.

1. A receiver appointed in supplementary proceedings (under Code Pro., § 298), on duly qualifying, became, without any assignment, completely vested with the judgment debtor's title to a chose in action then owned by him, and, as a consequence, to a judgment afterwards recovered in his name thereon. Such title could not be disturbed by an assignment afterwards made by such debtor, nor by the appointment of an assignee of his property in bankruptcy proceedings taken two years later, at least so far as such judgment or its avails were necessary to enable such receiver to satisfy the judgments under which he was appointed. *Swarlout v. Schwerter*, 497.
2. On April 15, 1876, Sw. was appointed receiver of the property of K., in supplementary proceedings instituted on certain judgments against the latter. At that time, a claim existed in K.'s behalf, against decedent, for services rendered by K. to him in his life-time, one-half of which claim, however, K. had assigned to X. On this claim, K. recovered a judgment against the executors, etc., of decedent, in May, 1876. In August of the same year, Sc. recovered a judgment against K., who, in January, 1877, in obedience to an order made in proceedings upon that judgment, assigned to Sc. one-half of the judgment so recovered against the executors. The last-mentioned judgment was afterwards set aside, but another was entered in K.'s name against the executors, in February, 1880. In May of that year, K. was discharged in bankruptcy from all his debts existing December 27, 1877. In proceedings for the distribution of the proceeds of a sale of decedent's real estate for the payment of his debts, a contest arising on the question to whom the share corresponding to the half of K.'s demand not assigned to X.

belonged,—*Held*, that, as such share was less than the aggregate amount of the judgments represented by Sw., he was entitled thereto for the benefit of the creditors in those judgments—he having qualified before the assignment to Sc., and his title not being affected by that assignment, nor by the bankruptcy proceedings, or the discharge of K. therein. *Id.*

RELATIVES.

See GUARDIAN AND WARD, 5; WILL, 2.

RELEASE.

See CESTUI QUE TRUST, 8.

REMAINDER-MAN.

See ACCOUNTING, 14; LEGACY, 16; LIFE-TENANT.

RENTS.

See TESTAMENTARY TRUSTEE, 8; WILL, 2, 12.

RESIDENCE.

See DOMICIL.

RESIDUARY LEGATEE.

See LEGACY, 6.

REVISED STATUTES.

[Sections construed or cited.]

1 R. S., 728, § 14.....	<i>Richards v. Moore</i> , 278.
1 R. S., 728, §§ 14, 15.....	<i>Dickie v. Van Vleck</i> , 284.
1 R. S., 728, § 55.....	<i>Meeker v. Crawford</i> , 450.
1 R. S., 730, § 68.....	<i>Crowe v. Brady</i> , 1.
1 R. S., 773, § 1.....	<i>Richards v. Moore</i> , 278.
1 R. S., 773, § 1.....	<i>Dickie v. Van Vleck</i> , 284.
2 R. S., 60, § 21.....	<i>Townsend v. Bogart</i> , 98.
2 R. S., 63, § 40, subd. 4.....	<i>Hewitt v. Hewitt</i> , 271.
2 R. S., 67, § 68.....	<i>Matter of Taintor</i> , 79.
2 R. S., 85, §§ 17, 18.....	<i>Greenhough v. Greenhough</i> , 191.
2 R. S., 86, § 22.....	<i>Greenhough v. Greenhough</i> , 191.
2 R. S., 87, § 27, subd. 2.....	<i>Coleman v. Coleman</i> , 524.
2 R. S., 87, § 27, subd. 3.....	<i>Matter of Dunn</i> , 27.
2 R. S., 88, § 33.....	<i>Matter of Gardner</i> , 14.
2 R. S., 90, § 43.....	<i>Dixon v. Storm</i> , 419.
2 R. S., 93, § 58.....	<i>Walke v. Hitchcock</i> , 217.
2 R. S., 93, § 58.....	<i>Secor v. Sentis</i> , 570.

2 R. S., 93, § 58.....	<i>Meeker v. Crawford</i> , 450.
2 R. S., 93, § 58.....	<i>Matter of Roosevelt</i> , 601.
2 R. S., 93, § 60.....	<i>Spencer v. Popham</i> , 425.
2 R. S., 94, § 66.....	<i>Meeker v. Crawford</i> , 450.
2 R. S., 94, § 66.....	<i>Matter of Roosevelt</i> , 601.
2 R. S., 109, § 57.....	<i>Meeker v. Crawford</i> , 450.
2 R. S., 139, §§ 5, 6.....	<i>Machini v. Zanoni</i> , 492.
2 R. S., 150, §§ 1, 2.....	<i>Geoghegan v. Foley</i> , 501.
2 R. S., 221, § 6, subd. 1.....	<i>Dale v. Stokes</i> , 536.
2 R. S., 221, § 6, subd. 4.....	<i>Woodhouse v. Woodhouse</i> , 181.
2 R. S., 221, § 6, subd. 4.....	<i>Joel v. Ritterman</i> , 186.

REVOCATION OF PROBATE.

1. A creditor of a testator, not being a proper party to proceedings for the probate of his will, cannot invoke the authority conferred upon the court by Code Civ. Pro., § 2481, subd. 6,* to open, vacate, etc., the decree admitting the will. Nor, *it seems*, can he ask for revocation of probate, under section 2647, permitting such an application by "a person interested in the estate." *Heilman v. Jones*, 398.
2. *It seems*, that chapter 18 of that Code nowhere authorizes revocation of probate for want of jurisdiction; and that a decree granting probate, upon a petition showing jurisdiction by reason of decedent's residence in the county, after citation of the necessary parties, is conclusive on the question of such residence, except upon appeal. *Id.*
3. The intent of the final sentence of Code Civ. Pro., § 2648—excluding, from the one year's limitation of proceedings to revoke probate of a will, an application to vacate, etc., a decree pursuant to section 2481, subd. 6—is to soften the rigor of the remainder of the first-named section by extending the Surrogate's general power of setting aside, etc., to decrees of probate after a year from their rendition. After the year, the application is in the Surrogate's discretion. *Becker v. Boehus*, 493.
4. Accordingly, where a petition for revocation of a probate decree rendered in 1878 was presented after the lapse of more than seven years, by a daughter of testator, who, though then an infant, was not represented by guardian on the probate, she claiming that, by reason of the provisions of the Code mentioned, her time to apply was unlimited—It appearing that she became of age in 1874:—*Held*, that her absolute right to contest the probate ceased at the end of a year after the decree was rendered; that she had been guilty of laches by delay; and that the application should be denied. *Id.*

REVOCATION OF WILL.

See DELUSION, 3, 4.

SALE OF REAL ESTATE.

1. The executrix instituted proceedings for the sale of testator's real estate, to pay debts, wherein her claim against the estate, originally for over \$9,000, was adjudged at \$5,860.82, the difference between these amounts being made up of an appropriation of the assets by her, on account of her demand. The order for a sale, adjudging demands valid, etc., concluded, "subject to the adjustment as to the exact amount, and right to share in proceeds of sale on final accounting." On such accounting, the executrix having, in her account, stated her claim at \$9,469.01, and the amount paid at \$5,707.17, and having introduced the above order, etc., in evidence, the auditor disallowed the payment, holding that, by reason of the clause quoted, the claim had not been proved according to law. *Held*, that the clause in question did not deprive the order of its binding effect, as an adjudication of the amount of the claim, but that the basis of the establishment of the claim in the real estate proceeding was erroneous, and that, on the final accounting, the executrix should have been charged with interest on so much of the assets as she had applied to the claim, down to the time when the same was adjudged by the Surrogate in the former proceeding; that the claim should have been for the full amount of her demand; and that she should have been charged with the amount appropriated by her without authority, as assets in hand. *Matter of Gardner*, 14.
2. In proceedings to sell a decedent's real estate, for the payment of debts, a judgment for a debt due from him, entered on an offer of his executors, against whom the action had been revived, is not evidence of the debt, as, in such case, there is no trial on the merits. Nor is the offer competent evidence, as constituting an admission thereof. *Kavanagh v. Wilson*, 43.
3. The costs awarded in such a judgment are not a valid part of the claim, for the purposes of such proceedings. *Id.*
4. Where a mortgagee assigned the bond and mortgage with a guaranty of payment, and died, and thereafter the mortgage was foreclosed, and a judgment for deficiency recovered, the proceeds of sale, being more than sufficient for the purpose, having been applied by direction of the court to the payment of costs, fees and taxes, on foreclosure—*Held*, that those sums could not be considered as being any part of the adjudged deficiency, the whole of which constituted a debt which decedent's real property might be sold, etc., to pay. *Hurd v. Callahan*, 393.

See EVIDENCE, 2; LIMITATIONS, STATUTE OF, 4, 5.

SAVINGS BANK DEPOSIT.

See ASSETS; ESTOPPEL, 1; GIFT INTER VIVOS, 1-4.

SET-OFF.

See LEGACY, 10, 11.

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See GUARDIAN AD LITEM.

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See UNDUE INFLUENCE, 4.

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See CODE OF CIVIL PROCEDURE; INTERPRETATION OF STATUTE; REVISED STATUTES.

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See LIMITATIONS, STATUTE OF.

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See LIFE TENANT, 1.

SUBSCRIBING WITNESS.

See EXECUTION OF WILL; PUBLICATION OF WILL.

SUPPLEMENTARY PROCEEDINGS.

See RECEIVER.

SUPPRESSIO VERI.

See GUARDIAN AND WARD, 6.

SURETY.

1. Each of the sureties in the official bond of an administrator, etc., must be worth at least the penalty of the bond, over all debts, liabilities and property exempt from execution. *Sutton v. Weeks*, 358.
2. Where such a surety has become insufficient, since qualification, the Surrogate's court may require a new or additional surety. *Id.*
3. One who "guarantees the payment of a bond and mortgage" engages to pay not only the principal, but the interest which may accrue thereon. *Hurd v. Callahan*, 393.

See INDORSER; MORTGAGE.

SURROGATE.

1. The death of one who has deposited moneys in his name, as trustee for another, does not constitute the trust funds assets of decedent's estate; at most, it would devolve the trust upon decedent's representative, and

the Surrogate's court has no authority to call him to account as trustee, for the administration of that trust. *Crouce v. Brady*, 1.

2. A Surrogate's court has no jurisdiction, under Code Civ. Pro., § 2476, of the probate of the will of one who, at the time of his death, was a resident of this state, unless it is also shown that he resided in the county in which that court is located. *Oviedo v. Duffie*, 137.
3. The Surrogate's court, although without general jurisdiction of the construction of wills, has the right to construe a will so far as necessary for the distribution of the estate. *Steinle v. Oechler*, 312.

See ASSETS; DISCOVERY AND INSPECTION, 1, 2; GUARDIAN AD LITEM, 1; GUARDIAN AND WARD, 2; LEGACY, 14; TESTAMENTARY TRUSTEE, 16.

SUSPENSION OF OWNERSHIP.

1. The testator, by the first clause of his will, directed his debts, etc., to be paid. By the second, he gave to his wife the net income of all his property, for life; the same, after her death, to three children, in equal shares, for life; the principal, after their death, to grandchildren. By the third, he gave certain legacies, payable out of the income. By the fourth, he nominated "trustees" to carry his will into effect, without liability to give security. On an application for construction, etc., of the will, as respects personal property,—*Held*, 1. That so much of the second clause as suspended the absolute ownership of property was void, under 1 *R. S.*, 773, § 1, as effecting such suspension for more than two lives in being at the testator's death. 2. That so much of the same clause as bequeathed income to the wife for life was inseparable from the illegal portion, and fell with it; not being a separate, valid trust, nor unessential to the general scheme of the will. 3. That the remainder of the will, including the bequests contained in the third clause, was valid; and that, in other respects, the decedent died intestate. *Richards v. Moore*, 278.
2. The testator, by his will, gave the residue of his estate, after payment of debts and funeral expenses, to the executors, in trust, to pay one-sixth of the net income, quarterly, to each of six descendants for life, and, on the death of any one of them, to transfer his share absolutely to such descendant's issue, or in default of issue, to the survivors and their representatives, equally, *per stirpes*. *Held*, 1. That the provision, as regarded the descendants, was equivalent to a gift of a life estate to each, in severalty, and that there was no suspension of the absolute ownership, or power of alienation, of any share, longer than for the life of the particular beneficiary, after which, by the terms of the will, the share vested absolutely. 2. That this result was not affected by the vesting of the estate in trustees, for the purpose of receiving and paying over the income, the suspension being the same as if the gift of the income for life had been directly to the beneficiaries. *Dickie v. Van Vlack*, 284.

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See PREFERRED CLAIM, 4.

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See LIFE TENANT.

TESTAMENTARY CAPACITY.

1. The decedent, who was an unmarried woman, owning real estate of considerable value, died in November, 1879, aged about fifty-two years, in the house of her cousin, with whom she had resided since the death of her mother in 1862, having previously resided with the latter. She was a member of a church; attended church and Sunday-school regularly; took care of her room and person; could do some light housework and needlework, but was not in vigorous health; was afflicted with stuttering; uttered only short sentences; never learned to read or write, though she had attended school for three years; could not count more than ten, or tell the time of day from the clock, or add or multiply; had no idea of the value of property, or of money beyond ten cents; was easily lost in familiar streets; had no understanding of the amount of her property; had two sisters, one of whom was in an insane asylum; was herself adjudged an idiot in 1871; and otherwise evinced a weak mind, being unable to attend to most things which persons of ordinary intelligence can do. Her alleged will, signed by a cross, bore date in 1869, and left all to a member of the family in which she lived, the daughter of her cousin, who was present when she visited a lawyer's office, where the will was drawn, and also at the time of the alleged execution, the devisee's brother writing decedent's name around the cross. *Held*, that decedent was not of sound and disposing mind, at the time when the will purported to have been executed, and that the instrument should be refused probate. *Townsend v. Bogart*, 98.
2. While the law does not undertake to test a person's intelligence, and define the exact quality of mind and memory which he must possess to authorize him to make a will, it does require him to have a mind to know the extent and value of his property, the number and names of those who are the natural objects of his bounty, their interests in reference to their conduct toward him, their capacity and necessities; that he shall have sufficient active memory to retain these facts in his mind long enough to have his will prepared and executed; and if this amount of mental capacity is somewhat obscure or clouded, still the will may be sustained. *Id.*
3. The use of the term *compos mentis*, as a standard of testamentary

- capacity, is liable in certain cases to mislead—not all who come within that description being competent to make a will. *Id.*
4. An adjudication of the idiocy of an alleged testator, made two years after the date of the alleged execution of the will, while neither conclusive nor binding on the Surrogate's court, upon an application for probate, is to be distinguished from an adjudication of lunacy in a like case, which would, *it seems*, be less significant. *Id.*
 5. Partial insanity, or monomania, invalidates a will which is the direct offspring thereof, though the testator's general capacity be unimpeached. *Merrill v. Rolston*, 220.
 6. The instrument propounded was executed in 1871. A week or two before its execution, decedent called upon the lawyer who drew the will, and who knew nothing of his property, his family, or his testamentary purpose; gave him instructions, with intelligence and coherence, as to its provisions; made an appointment for an interview at decedent's house, which was had, and at which a draft of the will was left for examination; and afterwards came to the office of the drawer, and executed it. The will, itself, evinced an intelligent understanding of its terms, on the part of decedent, and a knowledge of the claims of the members of his family upon his bounty; but the testimony was conflicting as to his conversation and conduct before, during and after 1871. A few weeks after the execution, he wrote a letter to his son in Europe, for the most part intelligent and coherent, yet containing an unreasonable and unintelligible suggestion upon a single topic. In 1870, he manifested certain delusions, which, however, it appeared, were due to illness, from which he recovered. In 1871 and 1872, the evidence showed that he had a clear understanding of the character and value of his property, as exhibited by his statements to his agents, employed to manage the same; by intelligent accounts kept with those with whom he dealt; by employing workmen to repair his houses, and paying them according to contract, and in other ways. In 1874, he was adjudged a lunatic. He died in 1877, aged eighty-four years. *Held*, that—even conceding that decedent was of impaired mental capacity and that, therefore, more than proof of formal execution was necessary to show that the alleged execution was his intelligent and deliberate act—such additional proof was abundantly furnished by the evidence; that, upon the whole case, he must be deemed to have been of sound mind at the time of the execution, and that the petition for probate should be granted. *Dickie v. Van Vleck*, 284.
 7. The rule, in *Delafield v. Parish*, 25 *N. Y.*, 9—concerning the burden of proof of testamentary capacity—explained. *Id.*
 8. The burden of proving that a testator was not of sound mind at the time of the execution of a will, rests upon the one contesting the probate; so that if, upon the whole evidence, that fact remains doubtful, the will cannot be rejected on that ground. *Müller v. White*, 820.
 9. Evidence of an hereditary tendency to insanity, in a testator, does not establish that insanity manifested was probably congenital, or that it

declared itself at any particular stage of his career. *Bristed v. Weeks*, 529.

10. The opinion of a distinguished alienist, upon the probable mental condition of a patient, years before the latter had come under his observation, though entitled to respect, should be carefully scrutinized before acceptance, in a case where it is contingent upon the correctness of hypotheses not established by the evidence. *Id.*
11. The testator, who died in 1880, by his will, executed in 1871, gave the bulk of his property, amounting to about \$500,000, to an adopted daughter of his father, and to two of his aunts, K. and S. His nearest relatives, living at the time of the execution, were a father, a half-brother, and four aunts. The probate was contested by the half-brother, aged thirteen years, mainly on the grounds of undue influence exerted by the husband of S., and a want of testamentary capacity. Mr. S. had long occupied intimate confidential and fiducial relations with testator; but, although his wife was a principal beneficiary, it was not shown that he drafted the will, or advised as to its contents, or even knew of testator's intending to make, or having made it. Testator was insane in the early part of 1873, when he became an inmate of an asylum in France; and he was of unsound mind at times thereafter, contestant insisting that the insanity was continuous after the date mentioned. A medical expert, who attended him at the asylum in 1873, would not undertake to state accurately his mental condition in 1871, but testified that, from his examination, and from what he then learned of his antecedents, from testator, and from an aunt, B., he believed that the former was never in a condition of complete enjoyment of his intellectual faculties, or of balance in his nervous system. The information derived from B., was undisclosed by witness, and several of testator's declarations to him were against the weight of testimony; which was that testator manifested no irrationality until after 1871. A portion of the testimony, taken on commission, of a witness acquainted with testator, tended to show original mental aberration, but this portion was in response to the final general interrogatory, was vague as to dates, and in some particulars as to meaning, and was not followed by cross-examination. Certain collateral relatives of testator had been afflicted with mental disease, but there was no evidence of insanity in his lineal ancestry. Letters produced in evidence, written by testator before 1873, were in the main clever and amusing, often instructive, particularly on art subjects, and at times poetical and elegant. By a will executed in 1869, testator had made dispositions, also, in favor of B. and his other aunt, who were not mentioned in the will propounded, and which made no bequest to contestant, or, with an insignificant exception, to testator's father. Each of the two last-named persons, however, had ample means. *Held*, that the will was executed without undue influence on the part of Mr. S.; that its dispositions led to no inference of a disordered intellect on the part of the maker; that the latter was of sound mind at the time of its execution; and that it should be admitted to probate. *Id.*

12. If one be *compos mentis*, he can make any will, however complicated; otherwise none, however simple. He who asserts, of a testator, the unnatural condition of *non compos mentis*, must prove it. *Legg v. Myer*, 628.
13. The will propounded was executed in 1869, and the first codicil in 1872. The testator, on December 15, 1877, was stricken with apoplexy, resulting in paralysis. Shortly before this, he had arranged to add a second codicil to his will, and gave a memorandum to a draftsman for that purpose. The alleged execution of the second codicil, which was contested, was on January 25, 1878. The death occurred October 14th, of that year. When first taken, testator was unconscious, but he rapidly improved in mind and body, so that his physician ceased to attend him, and, though he never regained power of speech, or his former mental vigor, he became able to and did read the Bible much, and the paper daily, often calling attention to items which interested him; received visits, shook the hands of visitors, understood conversation, and manifested an interest in his pecuniary affairs; in short, was able to comprehend the extent of his property, the number of his children, and their relations to him, and had sufficient mind to understand the ordinary business transactions of life. It was shown that he took the codicil, after it was read to him, and read it himself, pointing to certain words which at first he was unable to decipher, after which the same was duly executed. *Held*, that the testator, at the time of the execution of the contested instrument, was possessed of that moderate degree of capacity necessary to enable him to make a testamentary disposition, and that the codicil must be admitted to probate. *Id.*

See DELUSION; IDIOCY; INSANITY; LUNACY.

TESTAMENTARY GUARDIAN.

See GUARDIAN AND WARD, 10, 18.

TESTAMENTARY TRUSTEE.

1. When a corporate dividend reaches the hands of a trustee holding stock, the determination of the rights of the respective beneficiaries rests with him, unaffected by any action of the corporation in declaring the dividend, and the rights of the beneficiaries then attach. *Crugg v. Riggs*, 82.
2. Testamentary trustees, charged with the duty of investment, have the right to change the investment, when the best interests of the beneficiaries seem to demand it, but are bound to exercise good faith and justice toward both life tenants and remainder-men. *Scotcl v. Roosevelt*, 121.
3. The testator, by his will, created a trust for his daughter, directing the trustee to hold the share of the estate belonging to her, to pay to her, until her majority, rents and income sufficient for her support and education; all the rents and income thereafter, until she reached twenty-

four years, and then the principal and accumulations. He further directed the trustee to deduct and retain "out of such rents, profits, interest, and income," while he held the share, "all proper and reasonable expenses and charges, in and for the care and keeping of the same, the renting, investing, and re-investing thereof," all taxes, etc., "and the proper expenses and charges of collecting and applying such income." The trustee claimed that the words quoted were a provision for compensation in lieu of commissions. *Held*, 1. That the words "expenses and charges," etc., referred not to compensation of the trustee, but to necessary disbursements in administration, and imported an intent that the daughter was to be supported out of the net income of the trust fund. 2. That the trustee was only entitled to commissions under the statute. *Greer v. Greer*, 214.

4. The rule for computing trustees' commissions, in such a case—stated. *Id.*
5. Although Code Civ. Pro., § 2818, makes no provision for the mode of appointing a successor to a deceased testamentary trustee, the proper course is indicated by section 2481, subd. 11; which is to follow the practice of the late court of chancery. *Tompkins v. Moseman*, 402.
6. Accordingly, on an application for a citation to show cause why such an appointment should not be made, *Held*, that a bond should be required of the appointee, and, it being discretionary with the court to what persons notice should be given, that service of the citation should be made on all the next of kin of the testator, residing in the county. *Id.*
7. An executor and trustee who, although having qualified, never acts or attempts to act as such, receives none of the funds, and is not cognizant of or consulted in respect to the management of the estate, is not liable for the acts of a co-trustee. *Cocks v. Barlow*, 406.
8. A testamentary trustee who mingles trust funds with his own, and uses them in his business, is chargeable, in the absence of proof by him as to the profits made, with compound interest. *Spencer v. Popham*, 425.
9. The provisions of *Laws* 1850, ch. 272, and *Laws* 1866, ch. 115 (each expressly amending 2 *R. S.*, 94, § 66), affected only cases of express trusts, and possibly powers in trust, authorized by statute, and had no bearing upon the question of commissions where the offices of executors and so-called testamentary trustees are inseparably united in the same persons; and where such is the case, only single commissions can be allowed. *Mocker v. Crawford*, 450.
10. An executor, clothed with a power in trust, who has already had or is entitled to full commissions on \$10,000 or over, cannot have full commissions, but can be allowed only one per cent. on annual income received and paid over; except, *it seems*, in the single instance where, on an accounting, annual rests are made for the purpose of compelling him to pay interest upon periodical balances which he should have invested. *Id.*
11. When an executor, who is directed by the will to hold a fund in trust, renders his account as executor and retains such fund, he can have full commissions then, and will be entitled to only one per cent. on the

- income thereafter received and paid over, where he has already had commissions on \$10,000 or over. *Id.*
12. *It seems*, that double commissions are not allowable on the transfer of an estate from one executor or trustee to another, unless such other is directed by the will to take and hold it upon a separate and distinct trust; and the mere closing up, by executors, of their duties as such, and retaining the fund for beneficiaries under the will, does not affect such transfer. *Id.*
 13. The testator, by his will, gave his realty and personalty, amounting to over \$1,400,000, to his four executors in trust, to pay debts, etc., and divide the residue into five shares, the income of which they were to receive and apply to the use of his five children, respectively, during life, and, after the death of any child, to distribute the principal of his share among the grandchildren. The will also gave the executors power to sell real estate, but provided that no securities should be sold. In 1877, the executors accounted, and were, by the decree, allowed half commissions, amounting to over \$20,000, for receiving, and directed to retain and keep invested the balance of the estate, pursuant to the will. They thereafter paid over income quarterly, deducting therefrom one per cent. for each of three executors. On the death of one child, an accounting was had, with a view to the distribution of the principal of her share; the executors having sold securities held by them, for that purpose. They claimed half commissions also as trustees, on the entire capital which came into their hands as trustees, and half commissions on the fifth about to be distributed. Various objections were filed to the account. *Held*, 1. That the functions of the executors, as such and as trustees, were inseparable, and they could not have full commissions in both capacities. 2. That, as the will did not give the income of any specific sum to any child, but the amounts to produce the income were uncertain, commissions on income paid over were deductible therefrom, and not a charge on the estate at large. 3. That the executors, in retaining their commissions on income, did not violate the rule forbidding appropriation of funds without allowance by the Surrogate—their account having been settled on a previous accounting; but that they had no right to take half commissions at once, on first receiving the funds of the estate. 4. That, in view of the amount and character of the estate, the employment of a clerk by the executors, at \$600 annual salary, was proper, and his compensation a reasonable disbursement. 5. That, notwithstanding the prohibition to sell securities, such a sale was intended and justifiable, being necessary to a distribution of the share of the deceased child. *Id.*
 14. The act of 1866 (ch. 115) was the only law authorizing Surrogates to allow commissions to testamentary trustees. *It seems*, that, by its repeal in 1880, the subject of such commissions was left wholly unprovided for, except (under Code Civ. Pro., §§ 2736, 2811) in a case where the personal estate exceeds \$100,000. *Id.*
 15. The testatrix, who died in 1864, by her will, after disposing of her per-

- sonal estate, devised her real estate to her executors, in trust to sell the same, pay one-half the proceeds in manner directed, and hold the other half for the benefit of A. and B., two grandchildren, and to make advances therefrom as necessary and expedient, for their education and maintenance. D., the qualifying executor, sold the real estate, paid one-half the proceeds, retained the other half, and died intestate in 1878, never having filed an inventory or rendered an account, or paid any sum to A. or B. On an application by A., under Code Civ. Pro., § 2818, for the appointment of a successor to D., as a testamentary trustee—*Held*, that D. was not a testamentary trustee within the meaning of Code Civ. Pro., § 2514, subd. 6—the trust not being “separable from his functions as executor;” that the trust fund, derived from the conversion of the real estate, constituted legal assets, for which D. was accountable only as executor; and that the Surrogate’s court had no authority to appoint a trustee as his successor, but that an administrator with the will annexed would succeed to all his powers and duties, and might be appointed upon a proper petition. *Matter of Clark*, 406.
16. The act of 1866 (ch. 115), amendatory of 2 R. S., 94, § 66, and which expressly authorized the Surrogate’s court to grant commissions to testamentary trustees, was extinguished by L. 1880, ch. 245; but this extinguishment did not deprive the Surrogate’s court of power to allow such commissions—testamentary trustees being within the equity of the statute, 2 R. S., 98, § 58, relating to the compensation of executors and administrators, and the right to grant commissions being an incident to the jurisdiction over the accounting. *Matter of Roosevelt*, 601.
 17. It was the evident purpose of chapter 18 of the Code of Civil Procedure to give to the Surrogate precisely the same authority in reference to testamentary trustees as that with which he is invested as regards executors and administrators. Authority to allow commissions to such trustees is implied in title 6 of that chapter. *Id.*
 18. The fact of one’s reception of commissions as executor is not, *ipso facto*, a bar to his claim for commissions, as trustee, upon the same fund. *Id.*
 19. Where a separation of the two functions of executor and trustee is clearly intended by a testator, and has been actually effected, double commissions may be allowed to one person acting in both capacities. *Id.*
 20. The question whether trust duties enjoined by a will are a mere enlargement of executorial functions, or involve the existence of a trustee as such, may be tested by a consideration of the effect of the resignation or removal of the executor. *Id.*
 21. The uniform construction of statutes of this State, awarding commissions for “receiving and paying out” moneys, is that one-half is deemed to be given for the reception, and one-half for the disbursement thereof. *Id.*
 22. The testator, who died in April, 1875, by his will nominated A., B. and C., as “executors thereof and trustees under the same;” of whom A.

and B. qualified, C. omitted to qualify, and B. died in February, 1878. By the fifth clause, testator gave to his executors the residue of his personalty, in trust to divide equally, and set apart for investment in the names of the executors and trustees, shares for his surviving children, respectively, to receive the income of each share, and apply the same to the use of the several children, for life, and, upon the death of each, to transfer the share to his or her issue; and in case any child should die before testator, leaving issue, to hold such child's share, as trustees, in trust, to receive the income, and apply it to the use of such issue during minority. By the sixth clause, testator gave the residue of his realty to his executors, "as trustees in trust," to receive the rents, etc., and apply them substantially in the same manner as before provided concerning the income of the personalty. Three adult children survived testator. In December, 1878, the executors accounted, *as such*, for the personalty which had come into their hands, and also *as trustees* for the *rents* of the realty. Upon the settlement of that account, they were awarded full commissions, both upon the *capital* of the personalty then ready to be set apart for the three trusts, and upon the entire *income* of the personalty. *As trustees*, they were allowed, also, commissions upon the income of the trusts of realty. The decree directed the accounting parties to divide, the estate in their hands, amounting to over \$1,200,000, with the exception of one item, into three parts, and invest the same "in the names of the said executors as trustees," for the children, respectively. The executors divested themselves, as such, of the securities, making formal assignments thereof to themselves, as trustees for the three trusts, and kept the accounts relating to the same separate from each other, and from those relating to the balance of the estate. After B.'s death, A. accounted in March, 1878; and in March, 1881, *as trustee*; and in November, 1881, he accounted *as executor*, for assets retained in that capacity. Upon the settlement of the third annual account, application was made for an allowance to A., and to the representatives of B., of commissions *upon the corpus* of the real estate, and, *as trustees*, upon the capital of the personal trusts. *Held*, 1. That the court had jurisdiction to allow the commissions of the testamentary trustees, notwithstanding the repeal, in 1880, of *Laws* 1866, ch. 115. 2. That A. and B. were "testamentary trustees," within the definition of Code Civ. Pro., § 2514, the trusts executed by them being separable from their functions as executors. 3. That a proper case was presented for an allowance of trustees' commissions, a separation of the functions of executor and trustee having manifestly been intended by the testator, as well as effected pursuant to a decree of the court. 4. That each of the trustees was entitled, as such, to one-half commissions (*viz.*: for receiving), upon the entire capital of the personal, and also of the real trusts. *Id.*

See EXECUTORS AND ADMINISTRATORS; WILL.

TOMBSTONE.

See MORTUARY MONUMENT.

TRIAL.

See ACCOUNTING, 1, 2.

TRUSTEE.

See CESTUI QUE TRUST; TESTAMENTARY TRUSTEE.

UNDUE INFLUENCE.

1. Considerations addressed to the intelligence and good feeling of a testator, which leave him still to his independent choice, or which influence his better judgment, cannot be regarded as undue, to the extent of affecting the validity of the testamentary act. *Tucker v. Field*, 139.
2. The testatrix died in 1878, at the age of eighty-four, in Paris, where she had chiefly dwelt since 1869, leaving a will executed in 1877, at the American Legation there, in conformity to the laws of this State, whereby she gave the bulk of her estate, consisting of personal property, to two daughters, her only children. The evidence, with respect to her statements and other acts, during her life-time, as indicating an intent to retain or change her domicile, was conflicting. She had executed a previous will in this State, dividing her property equally between her daughters; but the one propounded gave much more to one of them, who had become a widow, and was without means of support, while the other was in comfortable circumstances—the effect being to about equalize their incomes. It appeared that the testatrix had latterly been under the care and influence of the widowed daughter, who had solicited the alteration in the disposition of the estate, and had represented to her the change in condition which justified such an alteration, but it did not appear that any untrue representations had been made. Testatrix was possessed of remarkable mental vigor and a strong will. *Held*—1. That the testatrix was domiciled in this State at the time of her death, she never having been authorized by the emperor, under the French Code, to establish a domicile in France. 2. That the influence shown was not undue, and that the instrument propounded, having been executed conformably to the laws of this State, should be admitted to probate. *Id.*
3. The influence or importunity which is sufficient to avoid a will must be such as amounts to moral coercion, restrains independent action, destroys free agency, and makes the will the act of another than the alleged testator; it must have been exercised with regard to the very act, and the exercise will not be inferred from opportunity or interest. *Merrill v. Rolston*, 220.
4. The earnest presentation to a testator, by a spiritual adviser, of proper arguments, and the enforcement of motives, whereby the intellect is

persuaded and the conscience quickened, are legitimate influences, and the results praiseworthy, where they do not violate natural obligations. *Id.*

5. The testator and his wife, after the former had made a will, giving all his property to the latter, for life, remainder to his next of kin, adopted a little girl of tender years, and brought her up as their daughter. By a codicil to his will, testator substituted the adopted child as legatee, etc., in place of his collateral relatives, and died, leaving no widow or descendants. Probate of the codicil was contested, on the ground of undue influence exercised by testator's wife; the evidence in support of which were statements made by her during her life-time, and, in particular, various significant remarks addressed by her to testator, to compel him to sign a paper, to which he at first demurred, but at length suddenly consented, announcing himself ready to do "anything for peace' sake." The evidence, however, did not render it certain that the paper in question was the codicil; nor did the latter alter the will for the wife's benefit. *Held*, that a failure to provide for the daughter would more readily have given rise to a suspicion of undue influence, than the execution of the disputed codicil; and that, upon the evidence, the latter must be admitted. *Shields v. Ingram*, 348.
6. *It seems*, that, where one sustaining a fiducial relation to another is concerned in framing the latter's will to his own advantage, the instrument ought to be closely scrutinized, and that there is a presumption against its validity, strong or weak, according to the circumstances. *Bristed v. Weeks*, 529.
7. It is not influence by a beneficiary, but undue influence, amounting to moral coercion, that will vitiate the act of a testator. *Ewen v. Perrine*, 640.
8. The burden of proving undue influence on the part of beneficiaries in a will rests upon contestant, where it appears that testator was of sound mind at the time of its execution. *Id.*
9. Evidence of expressions of testamentary purpose, by a testator, are of great weight in enabling the court to determine whether a will is the result of undue influence. *Id.*
10. The decedent, who died in May, 1880, aged eighty-five years, leaving him surviving a sister and nephews and nieces, by his will gave all his property to Mr. and Mrs. P., persons not related to him, with whom he had boarded for years. The will was executed with due formalities, the testator being of sound mind, though in feeble health at the time. There was no direct evidence of undue influence, although it was shown that the beneficiaries had abundant motive and opportunity to exert such influence, and their conduct impressed the court that they would not have deemed it wrong to influence testator to give them his property. The character and conduct, on the stand, of some of propo-
nent's witnesses, also aroused suspicion that the whole truth had not been proved. But testator gave instructions for the will to the scrivener, they being alone at the time, and each of the subscribing wit-

nesses, one of whom was a physician, testified positively to the facts of execution, and that testator was of sound mind and not under restraint. It also appeared that, during three years preceding his death, testator had repeatedly announced his intention to make the disposition of his property effected by the will. *Held*, that it was not the province of the court to dispose of decedent's property in accordance with its notions of justice, nor could it deal with suspicions of undue influence not shown to have been exercised; that the proponents had made out a strong affirmative case, which contestants had not overthrown; and that the petition for probate should be granted. *Id.*

See DELUSION, 2; WILL.

VARIANCE.

A variance between the relief prayed for in a petition, and that specified in the citation issued thereupon, is curable by amendment. *Spencer v. Popham*, 425.

VESTING.

See LEGACY, 10; SUSPENSION OF OWNERSHIP.

VOUCHERS.

See ACCOUNTING, 4.

WARD.

See GUARDIAN AD LITEM; GUARDIAN AND WARD.

WILL.

1. The policy of the statute (2 R. S., 60, § 21), limiting the age under which a person cannot be a testator—explained. *Townsend v. Bogart*, 98.
2. The testator, by his will, gave all his personal, and part of his real property to his wife, and directed the executor, as soon as practicable, and in his reasonable judgment proper, after the death, but within a year, at most, to sell the residue of the real property, and dispose of the proceeds of sale among legatees named. The executor collected rents, and sold the real property, but not until after the year, and, on his accounting, claimed that he was not bound to include the rents so collected, being answerable therefor to the heirs, and not to the legatees. *Held*, 1. That the power of sale, given to the executor, was an imperative power in trust, which, notwithstanding the discretion given, effected an equitable conversion of the real into personal property, from the testator's death. 2. That the rents, as well as the proceeds of sale, became assets in his hands, and he was accountable therefor, in his capacity as executor, to the legatees, in the Surrogate's court. *Ingram v. Mackey*, 357.

3. Upon an application for the probate of a will, as lost or destroyed—it appearing to have been in existence at the time of decedent's death—the loss or destruction is a fact material to be proved. *McNally v. Brown*, 372.
4. Upon an application for the probate of a lost or destroyed will, it is not necessary—under Code Civ. Pro., §§ 1865, 2621, requiring its provisions to be “clearly and distinctly proved by at least two credible witnesses”—that the witnesses should remember the exact language; but they must be able to testify at least to the substance of the whole will, so that it can be incorporated in the decree, if probate is granted. *Id.*
5. Accordingly, where probate was asked of a will in existence at the time of decedent's death, and last seen in the possession of the principal beneficiary, the petitioner, but there was no evidence that it had been lost or destroyed; and the testimony of the petitioner, the draughtsman, the subscribing witnesses, and another, as to its provisions, was such as only to enable the court to surmise the nature thereof, and no two witnesses proved all the provisions—*Held*, that there was not a compliance with the statute, and that probate must be refused. *Id.*
6. The requirement, in Code Civ. Pro., § 1865, that the provisions of a lost or destroyed will must be “clearly and distinctly proved by at least two credible witnesses,” should receive a liberal construction; and its spirit is complied with by holding that it applies only to those provisions which affect the disposition of property, and are of the substance of the will. *Early v. Early*, 376.
7. The destruction of a will in the life-time of a testator, without his knowledge or consent, in disregard of his intention, and to the injury of a beneficiary, though with no design to gain advantage, or injure or deceive any one, is fraudulent within the meaning of the same section. *Id.*
8. Upon an application to prove a will alleged to have been fraudulently destroyed in testator's life-time, the subscribing witnesses agreed that the will was read aloud to and signed by the testator, in their presence, and that they signed in his presence, but they differed as to whether the declaration of the nature of the instrument, and the request to sign, were made by the testator, one witness swearing positively that they were so made, and the other stating that they were made in testator's presence, by M., who drew the will and supervised the execution. Though testator was ill and feeble, it did not appear that he was in such a condition as to be unable to make or dissent from such a request and declaration; the execution was not immediately before his death; and both subscribing witnesses testified that he was of sound mind. Two witnesses agreed that all the property was devised and bequeathed to testator's widow, but differed as to whether an executor was appointed. After the will was executed, the draftsman took it with him to keep for testator, put it among his papers, and died. His son found it among his father's papers and destroyed it, during testator's life-time, as a paper of no importance. *Held*, 1. That the due and proper execution was shown. 2. That the provisions were sufficiently proved, notwithstanding the doubt as to the appointment of an executor, which

was not an indispensable part of the will. 8. That the destruction was fraudulent, as against the beneficiary, within the meaning of the statute. 4. That the petition for probate should be granted. *Id.*

9. The testator, in his will, desired his executor, and the wife of the latter to "fix some valuation" of the furniture, books and other articles in his house, of which he might be possessed at his decease, and distribute them among his "relatives mentioned" in his will, "as they may deem discreet and proper." There were legatees who were related by marriage. *Held*, 1. That testator intended the articles to be divided into shares of equal value, and that the discretion conferred related only to the allotment of the various equal shares among the beneficiaries, which must be made *per capita* and not *per stirpes*. 2. That, in the absence of an express provision to the contrary, the relatives intended were relatives by blood, and not by affinity. *Blossom v. Sidway*, 389.
10. The testator died in 1868, leaving an estate of \$125,000, a widow, and five children, as follows: two married daughters, A. the husband of F., and B. the husband of G.; one unmarried daughter, C.; and two sons, D. and E. (the latter not *sui juris*). By his will, he appointed his widow, all his children, and his sons-in-law, executors, directing them, within three months after his death, to invest, on bond and mortgage, in Westchester county, funds sufficient to yield an annuity of \$1,000, to be paid to his widow during life or widowhood, and dividing the rest of his property among his children, E.'s share being in trust for life, with remainder to his issue. The widow qualified as an executrix, but D. and F., a son and son-in-law, partners in business, assumed the exclusive management of the estate, and were the only active executors. On May 1, 1870, over \$100,000 having been divided among themselves by the children, and no investment having been made for the widow, \$10,000 was lent, at the instance of D., on mortgage upon lands in Wisconsin, at ten per cent. interest, to provide for her annuity. This investment proved disastrous, and the widow protested against it, on learning that it had been made. The other executors acquiesced. D. and F. failed in 1876, after which the widow received no considerable portion of her income. About the same time, all the executors, except the widow, gave her their personal bond conditioned to pay her the annuity, which was not complied with, whereupon B., G. and C. paid her \$1,800, and obtained a release from all claims. On an application by the widow for a decree that the co-executors pay her the arrears of income, and make the required investment, and be removed from office, etc.,—*Held*, 1. That the investment in Wisconsin was a glaring breach of trust; for which, however, the widow was not responsible, not having been consulted, nor having acquiesced either as co-trustee or as *cestui que trust*. 2. That by her release she had discharged B., G. and C. from liability. 3. That the decree must be against A., F. and D., directing payment of the arrears of annuity and interest, and they they invest, as directed by the will, a fund necessary to pro-

duce the annuity, having regard, in fixing the amount, to the effect of the payment of the \$1,800. 4. That the prayer for removal was inconsistent with the other relief asked, and must be denied. *Cocks v. Barlow*, 406.

11. The appointment of an executor is not an essential of a will. *Brady v. McCrossen*, 431.
12. Where a will directs executors to sell and convey testator's real and personal property as soon after his death as they shall deem best, and dispose of the proceeds, the Surrogate's court has no power to order a sale of the realty in compliance with such direction, but, as to the personalty, it is the executor's duty to *deem it best* to sell as soon as can conveniently be done; and where a loss occurs in consequence of their neglect so to do, they are chargeable with the amount. *Campbell v. Purdy*, 434.
13. The testator, by his will, executed in 1871, shortly before his death, gave, substantially, all his property to his executors in trust, to receive the rents and profits, and to sell and convey the same at such time as they should deem advisable, directing that from such rents, etc., or from the proceeds of such sale, they should reserve, and pay to certain relatives, "a sum of money equivalent to the net annual rental for four years (after deducting taxes and expenses)" of a house and lot specified. He appointed residuary legatees. *Held*, 1. That, by the words quoted, the testator meant the rental, after deducting all expenditures in and about the property in question, including taxes, repairs, insurance, interest on mortgages, and other direct charges, for the four years succeeding his death. 2. That the relatives in question were entitled to interest on their legacies from the end of the said four years. *St. F. Xavier College v. Doherty*, 526.

See ANNUITY; DELUSION; EXECUTION OF WILL; INTERPRETATION OF WILL; LEGACY; PROBATE OF WILL; PUBLICATION OF WILL; TESTAMENTARY CAPACITY; UNDUE INFLUENCE.

WITNESS.

1. The testimony of a witness, to the actual signature of another in his presence, is not necessarily sufficient to overcome all evidence tending to a contrary conclusion, based upon the opinion of witnesses, familiar with the handwriting in question, as to its genuineness. *Sargent v. Hesdra*, 47.
2. The testimony of experts, who are selected by the party in whose behalf their testimony is given, and whose testimony in his favor is assured beforehand, falls short of that impartiality which characterizes ordinary witnesses, and requires to be scrutinized with care. *Id.*
3. It is improper to assume the criminality of a witness for the purpose of meeting coincident evidences of corruption, or of explaining apparent dissimilarity or contradiction. The rule is to assume the honesty of the witness, until either his testimony is shown to be so inconsistent as

to impair his veracity, or his general character for truth and honesty is successfully attacked. *Id.*

4. Medical experts on insanity—reviewed. *Dickie v. Van Vleck*, 284.
5. The testimony of a witness, who assumes to recollect the exact day of a conversation had eighteen years previously, without giving any reason for her accurate memory, is to be received with caution. *Shields v. Ingram*, 848.
6. Courts are not bound, as of course, to grant to a witness the claim of privilege from giving incriminating testimony, simply because he swears that the necessity for its exercise has arisen, but themselves have an authority and discretion in the premises; and they should not concede the claim where the nature of the question does not, under the particular circumstances apparent at the time, immediately suggest the reasonableness of the claim and the injustice of denying it. *Youngs v. Youngs*, 505.
7. *It seems*, that a witness, who has disclosed, without objection, part of a transaction, wherein, under circumstances tending to criminate him, he has been engaged, is bound, if thereafter questioned, to testify fully concerning that transaction; that, by voluntarily answering in part, as to that very transaction, he waives the privilege of refusing to answer, which he might have enjoyed at the outset, if he had chosen to solicit it. *Id.*
8. Letters of administration upon the estate of T. having been granted October 12, 1877, on an allegation of his death, to one who applied therefor as his widow, proceedings were instituted February 27, 1878, by his brother, to revoke those letters, on the ground that T. was then alive. A witness was produced who swore, on his direct examination, that he was T., and, on his cross-examination testified, without reluctance, as to the events of his life prior to 1875, in which year, according to his statement, he left Boston, not visiting that city again until 1880. Upon being asked whither he went on leaving Boston, he declined to answer on the ground that his reply would tend to charge him with a crime. He refused to name any person with whom he had lived or associated during that period, or to state any business or occupation in which he had been engaged. He testified that he had been neither in prison nor under arrest, but when asked if he had been charged with crime, he again invoked his privilege and declared that he would answer no more questions in that regard. *Held*, 1. That since, at the time when the witness refused to answer the questions put to him on cross-examination, he had not disclosed any transaction, whatever, occurring within the five years as to which he subsequently declined to testify, he did not waive his privilege within the rule secondly above stated; but 2. That since, at the time of the refusal, no subject had been broached which even faintly suggested the possibility of witness's connection with the commission of a crime, his bare statement that his answer might tend to criminate him was an insufficient basis of his claim of privilege, and that he must be recalled for further examination. *Id.*

9. In respect to this claim of privilege, there are two extremes which ought equally to be avoided: First, that of requiring, from a witness who has honestly claimed the privilege, any explanation whatever of his reason for refusing to answer, if the court can see how such answer may fairly and reasonably tend to criminate him; and Second, that of permitting a witness to interpose the shield of apprehended peril as a protection against every question which he is disinclined to answer, although there be nothing in the circumstances of the case which in the least suggests the danger. *Id.*

See WILL, 4, 6.

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